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1311

No. 3833

1312

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM R. CASTLE, LORRIN A. THURSTON
and ALFRED L. CASTLE, Trustees Under
the Will of JAMES BICKNELL CASTLE,
Plaintiffs in Error,
vs.

HAROLD K. L. CASTLE and the TERRITORY
OF HAWAII,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

FILED
MAR 20 1922
F. D. MONCKTON,
CLERK,

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM R. CASTLE, LORRIN A. THURSTON
and ALFRED L. CASTLE, Trustees Under
the Will of JAMES BICKNELL CASTLE,
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VS.

HAROLD K. L. CASTLE and the TERRITORY
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Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

IN PROBATE—AT CHAMBERS.

No. 5383.

In the Matter of the Assessment of the Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

Stipulation.

IT IS HEREBY STIPULATED by and between the Territory of Hawaii by Harry Irwin, Attorney General, W. R. Castle and H. K. L. Castle, Executors under the Will of James Bicknell Castle, deceased, and W. R. Castle, L. A. Thurston and A. L. Castle, Trustees under the Will and of the Estate of James Bicknell Castle, deceased, by Robertson, Castle and Olson, their attorneys, and Harold K. L. Castle by Frear, Prosser, Anderson and Marx, his attorney, as follows:

1.

That the said James Bicknell Castle died testate at Honolulu, Hawaii, on April 8, 1918.

2.

That a copy of the last Will and Testament of the said James Bicknell Castle, which was duly admitted to probate in the Circuit Court of the First Judicial Circuit, May 18, 1918, is hereto attached and made a part of this stipulation and marked Exhibit "A."

3.

That the gross value of the estate which by

said last [1*] Will and Testament was transferred to said Trustee is the sum of \$707,359.79, as more particularly set forth in Exhibit "B" hereto attached and made a part of this stipulation.

4.

That the widow of the deceased testator duly elected to take by way of dower rather than under the Will, and that there was duly set apart and transferred to the said widow by the Trustees in full settlement of her dower rights an absolute title in and to property of the estate of the value of \$237,051.83, leaving property in the hands of the said Trustees as of the date of the death of said testator of the value of \$470,307.96.

5.

That the value of the life income bequeathed to said Harold K. L. Castle, son of the testator, as of the date of the death of said testator, is the sum of \$183,165.53.

6.

That the Federal estate tax chargeable against said estate and deductible from the gross estate before the Territorial inheritance tax can be computed as nearly as the same can be ascertained at the present time, amounts to the sum of \$92,623.17; and it is hereby stipulated and agreed by and between the parties hereto that if the amount of the said Federal estate tax shall be later increased or decreased a corresponding increase or decrease will be made in the amount of the Territorial inheritance tax as herein computed and

*Page-number appearing at foot of page of original certified Transcript of Record.

if it shall be finally determined that any such tax is due and payable such difference in the amount of said Territorial inheritance tax will be paid by the Trustees [2] to the Territory or by the Territory of the Trustees as the case may be, or the said readjustment of the amount of the said Territorial inheritance tax will be made between the Territory and such of the parties hereto as are finally determined to be liable therefor.

7.

That the total administration and other expenses, including the Federal estate tax, as presently computed, which are deductible from the value of the said estate before the Territorial inheritance tax may be computed, amount to the sum of \$153,-063.75.

8.

That the inheritance tax due on the said life income bequeathed to the said son, if any such tax be due and payable, and after making the deduction of \$5000.00 allowed by the statute amounts to the sum of \$4569.96, with interest thereon at the rate of 7% per annum from October 8th, 1919.

9.

That the value of the residuary estate for inheritance tax purposes after deducting the present value of the said life income bequeathed to the said son, amounts to the sum of \$134,078.58 and that the inheritance tax thereon, if any such tax be due and payable, amounts to the sum of \$7750.10 with interest thereon at the rate of 7% per annum from October 8th, 1919.

10.

That the value of the residuary estate for inheritance tax purposes without deducting the present value of the said life income bequeathed to the said son, amounts to the sum of \$317,244.11, if said present value is to be included, and [3] that the inheritance tax thereon, if any such tax is due and payable, amounts to the sum of \$19,655.86, with interest thereon at the rate of 7% per annum from October 8th, 1919.

Honolulu, Hawaii, April 4th, A. D. 1921.

TERRITORY OF HAWAII,

By (Sgnd.) HARRY IRWIN,

Attorney General.

W. R. CASTLE,

H. K. L. CASTLE,

Executors Under the Will of James Bicknell
Castle, Deceased.

By (Sgnd.) ROBERTSON, CASTLE,
OLSON,

Their Attorneys.

W. R. CASTLE,

L. A. THURSTON,

A. L. CASTLE,

Trustees Under the Will and of the Estate of
James Bicknell Castle, Deceased.

By (Sgnd.) ROBERTSON, CASTLE,
OLSON,

Their Attorneys.

HAROLD K. L. CASTLE,

By (Sgnd.) FREAR, PROSSER, AN-
DERSON & MARX,

His Attorneys. [4]

Exhibit "A."

WILL OF JAMES B. CASTLE. [5]

WILL OF JAMES B. CASTLE.

I, JAMES BICKNELL CASTLE, of Honolulu, in the Island of Oahu, Territory of Hawaii, being of sound and disposing mind and memory and conscious of the uncertainties of life, do hereby make, publish and declare this as and for my LAST WILL AND TESTAMENT, hereby revoking all Wills heretofore by me made, and particularly that WILL made by me on the 20th day of October, 1887.

I devise and bequeath to my wife, Julia White Castle, the estate known as Mahuilani on Haleakala, Maui. All the rest of my estate, real personal and mixed, I devise and bequeath to My EXECUTORS AND TRUSTEES hereinafter named for the following purposes:

First. For the payment of my just debts and funeral expenses.

Second. For the following uses and purposes which I will explain in some detail.

I want the business represented by the Hawaiian Development Company, Limited to go on in the same way as though I were here. The general plans of development in Kona and Koolau are very familiar to Mr. McStocker and in a broad, general way, to Mr. Withington and Mr. Thurston. I have gone into these various enterprises prepared, if

necessary for their successful establishment, to hypothecate all of my securities; but, preferably to the continued burden of heavy indebtedness, as rapidly as full value may be obtained, by selling some of my old securities, to convert the same into the new enterprises.

In line with this, it is my present intention, and in case of my decease I desire my Executors and Trustees, if in their discretion it seems best, to convert two thousand (2,000) shares of Alexander & Baldwin, Limited, stock into cash, provided it can be sold for not less than Two Hundred Dollars (\$200.00) per share, putting the same into Kona investments, preferably West Hawaii Railroad Company, and into the Koolau Railway [6] Company, either or both. After the Kona Development Company and the sugar enterprise which I have planned to mature from the Heeia Agricultural and Koolau Agricultural Companies' properties shall have become successfully established, I do not wish to expand any further in sugar, but only so far as each mill may become the central factory for the manufacture of sugar from the cane bought of small growers.

I do not bind my Executors to follow the line of development above indicated, but mean to confer upon them the widest discretion as to investment and development.

I hope before many years that franchises of such character may be obtained for both the Koolau Railway Company and the West Hawaii Railroad Company as will simultaneously give to such com-

panies the largest command both of all the resources available for financing the same, and of protecting the public interests by turning back to the State all the receipts in excess of such interest upon the actual cash invested in the enterprise as may be agreed upon as reasonable. My thought is that such excess would seldom, if ever, be returnable in cash, but in the form of better railroad facilities and equipment, all pointing toward the establishment of an ideal railroad and service to the community in which the railroad is built, and so far as possible such excess as can be foreseen in cash should be utilized in the directions indicated. These companies enabled to own or lease land without limit, should logically become the finest possible agencies for a wise immigration and homesteading by the re-distribution of such lands along the lines of the road. For the carrying out of these general purposes, including in the case of the Koolau Railway, its extension to Honolulu, provided my Executors are satisfied of the ultimate financial soundness of such extension, I wish to empower them completely to deal with any and all securities which I may possess, and otherwise, so far as lies within their power to finance such enterprises as I would have the power to do were I living.

My general aim in this whole matter is not to accumulate a great estate for my family or heirs beyond conserving the estate which I now possess and which may be conservatively valued as worth between a million and a millon and a half, [7]

but to devote any increase thereof to the purposes hereinafter indicated.

I desire my Executors to appropriate Fifteen Hundred Dollars (\$1500) a month to my widow, that being about the amount necessary to maintain Kainalu, Mahuilani and Puuokoa, Tantalus, if she so desires; that is to say, I desire to have nothing less than this paid to my widow for that purpose, or, if she desires, to apply to her other uses, so long as embarrassing financial conditions do not prevent. Subject to the like qualification that is, so long as such would not shorten the above-named Fifteen Hundred Dollars (\$1500.00) a month being paid to my widow, I desire to continue the payments which I now am making to an old friend and teacher in New York, Mrs. H. K. Hovey, whose present address is No. 7 West 108th Street, New York, Two Hundred Dollars (\$200.00) quarterly; and I desire to pay to Dr. T. M. Coan, present address 70 Fifth Avenue, New York City, One Hundred and Fifty Dollars (\$150.00) quarterly, for as long as each lives. I desire to assist Dr. N. B. Emerson in his literary work to such extent as may be necessary, not to exceed Six Hundred Dollars (\$600.00) a year during his life.

With the successful and profitable establishment, however, of the various enterprises involved, with the requisite income subsequent thereon, I desire to have the amount paid to my widow out of the Estate from its income increased to a sum not to exceed Forty Thousand Dollars (\$40,000.00) per annum.

Upon the decease of my wife, Julia White Castle, I desire to continue an income to my son H. K. L. Castle, subject to the following conditions: The minimum not to be less than Five Thousand Dollars, (\$5,000.00) per annum unless caused by financial embarrassment or inconvenience, (of which the Trustees shall be the absolute judges); the maximum not to exceed Forty Thousand Dollars (\$40,000.00) per annum, which Forty Thousand Dollars (\$40,000.00) shall include the income which he may be receiving from any property which I may give him prior to my decease, including the income from the One Thousand (1,000) shares of stock in Alexander & Baldwin, Limited, herein mentioned, together with that derived from property derived from his mother. [8]

Should the development of the Estate be such as to justify the expansion into other or related lines of business than those already initiated, of which condition my Executors, or a majority thereof, are fully empowered, without qualification, to decide, and its expansion through establishment of other enterprises in harmony with the ultimate object of my remaining in active business, namely, to accumulate sufficient land and capital to systematically establish an effort to introduce a high-class agricultural immigration of Northern races, preferably Scandinavian, Anglo-Saxon and Teutonic, then I desire them to expand into such enterprises without hesitation and I hereby empower them amply herein for the purpose.

I have promised my son Harold that if he made

himself a perfect success as a business man I would give him on his birthday on July 3d, 1912, One Thousand (1,000) shares of my Alexander & Baldwin stock, if I then possess the same, free and unencumbered. It was distinctly understood that I did not intend, in the meantime, to set aside or reserve this from any of my business operations whenever I should choose to utilize the same. In case of my decease, I desire my Executors, under the conditions set forth in this Will, to transfer to my said son, if living, the One Thousand (1,000) shares before-referred to. I desire that the certificate of his "perfect success as a business man" shall be his employment by Alexander & Baldwin, Limited, from September 3d, 1907, on which date he entered its service, uninterruptedly by any cause which he could reasonably control, to July 3d, 1912, aforesaid, to the complete satisfaction of its Manager and Board of Directors, unless his departure therefrom during such period shall be for the purpose of resuming and completing such college training, whether general or special, as he may become convinced of the need and value of as adequate preparation for his business and life work, such departure to be due in no degree to dissatisfaction of Alexander & Baldwin management with his services, and such resumption of College work to be with the cordial approval of J. P. Cooke or his successor as Manager of Alexander & Baldwin, Limited.

After the fulfillment of the requirements upon the estate as above set forth, I desire to have any

excess of income, and [9] after the decease of my said wife and son and said other beneficiaries before named, the whole income, (always subject to the decision of the Executors to devote same to any business enterprises whatsoever which they may approve), to accumulate toward an educational purpose to be initiated at such time as their judgment will determine the estate amply able to carry on without closing its commercial character. My strong desire in connection therewith will, I hope, be made clear by the following statement:

I believe that individuals, communities and nations are depraved and weakened by the excessive accumulation of wealth whenever the character has not become so permeated with a moral force and enthusiasm, as well as habits of a simpler life than that universally consonant with wealth, that the power represented by such wealth remains nothing more than an instrumentality for promoting moral and intellectual enlightenment of the race.

I believe that history shows that the ages of luxury furnish the fertile soil for national decay and that this is the operation of an inevitable law, true alike of the individual and community units composing the nation as of the whole.

I believe that the counteraction of this influence must be accomplished through some channel of education, if at all, and to my observation the injurious influence of unearned comforts is everywhere visible, the schools and colleges not excepted. The problem hereby set to education, as it seems

to me, is how may we provide, (or approximate provision for the children of the well-to-do), that training which necessity provides for the children of the poor. I believe that nothing can completely take the place, as one of the most important factors in the development of character, of the habits of work and duty which necessity provides for the large majority.

The nearest approach that I have been able to think of for this training, could be furnished by a boarding school, as it seems to me, in which the students and scholars would constitute an absolute democracy as among themselves, with special privileges to none; and it has long been my dream to establish such a school. It would be dominantly an agricultural school, which at once also certifies that it would be located [10] in the country. It would be exclusively a boarding school and not a day school. Its pupils in my conception of what would be most desirable would not return to their homes from the beginning to the end, say, approximately ten months of the usual school year, and I can easily imagine, without being able to elaborate and describe, the development of such a school into a home and family school of the nature that would easily command most of its pupils uninterruptedly for several years. It would be co-educational, the injurious influences of wealth telling, if possible, more fatally against the ought-to-be mothers of the race than the fathers.

The central principle of such a school would be the fact that every student therein would be obliged

to earn a certain definite proportion of his or her training and education. That proportion of each child's time would be employed therefor as would be productive for his or her own best good consonant with a wholesome percentage of play, albeit with sports never made the dominant, overwhelming passion that appears to be the case with the colleges, and accompanied by a regime of study contrasting with that universal in the schools preparatory to the colleges and universities by the paucity of branches simultaneously required, it being my thought in connection with the book work done in the schools that it errs very seriously upon the side of quantity rather than quality, and that fewer branches more slowly and thoroughly taught and the allied subjects suggested in the course of such studies more freely followed out therewith, presents a truer and a wholesomer scheme of mental training, the present being as herein suggested, overbalanced.

Such school would become a productive, large farm and I believe that every boy, and especially in a country like this which in its nature must always be dominantly agricultural, should be thoroughly trained as an intelligent agriculturist early in life, and that every girl should be trained in domestic science, so-called. I know of no place where this can be so thoroughly accomplished for both classes, debarring neither from all the opportunities of the other, as in such a farm-school.

Such a school should be run as a farm, with the best ability that can be secured for such a pur-

pose, and the endowment of [11] the school should be calculated to meet the deficit after full value has been credited for the products delivered to market, minus the credits paid the students for work, and the total expenses.

The total expense of such an institution eventually should determine the cost of the education and training to be received by the boys and girls, and from such total would be deducted in each scholastic year the value of their work which should be credited to them regularly, operating to reduce the cost of their school year. I believe that such a school could be established and an enthusiastic interest and ambition be instilled after a few years' experience in dealing with the problems which would arise. The initial tuition payable should be made nominal. The greatest ethical value in the education of character would, I think, develop inevitably under such a system and the conditions of admission would not depend at all upon wealthy parentage but rather the reverse.

I do not wish to impose upon the Executors in establishing and managing any such school the slightest requirement or condition distinctively religious. It is my desire neither to exact nor require, nor debar such observances. I should wish the school at least to be absolutely non-sectarian and non-denominational, my preference being that it should not be a distinctively religious school, although I am keenly appreciative of the beauty and fine influence of organ and religious music in a beautiful chapel. I believe that in conjunction with

the methods herein suggested a strong moral sense can be scientifically developed and almost created. This I conceive of as, in its final perfection of character, epitomizing into two words; unselfishness, which, perhaps, is all-embracing, but to which I add the Love of one's fellow-man, as the inspiring motive and thought in life.

I believe in such a school that the process for developing this trait could be systematically and successfully established. This process is almost totally lacking in families of the wealthy and no amount of admonition or precept can, it seems to me, impregnate the growing child with its fruit. It represents itself to my mind as occupying two stages of development, (it being recognized by the child, even though but theoretically, that the highest aim in life and growth is to do as [12] much good and to confer as much happiness upon one's fellow creatures as possible), the first stage consisting of the cultivation of the powers of accomplishment through work and training until the point is reached where one becomes entirely self-dependent, (incidentally, perhaps, this is a sense to which *independence* might wholesomely be altogether restricted), in order to relieve all others in every respect from one's own dependence; and the second stage, to continue such process of development of the powers of accomplishment through work and training so as to acquire as great a capacity as possible in order, from the excess over one's own necessities so acquired, to bless and help one's fellows.

Kainalu has been willed to me by Mrs. Castle in a

codicil dated June 12, 1900, to her Will dated October 20th, 1897. I have many times keenly regretted putting the very large amount of money that is there invested in a home for a very small family. Furthermore I am very strongly convinced that it represents a home of conditions of luxury decidedly prejudicial to the growth of that type of character which I have tried to suggest a favorable school for the attainment of. For a long time I have looked forward to its use eventually in some direction which I felt would be more appropriate, considering the expenditures therein and therefor.

The most practicable and feasible of these, I believe, to be eventually in connection with a large hotel, whenever passenger facilities between the Islands and the Mainland shall have become so rapid, frequent and comfortable as to bring travelers here in sufficient number to render the development of this place profitable in such connection. Failing this, but not advising my Executors positively in either direction, I have thought that it might some day be fitly made a library and art museum, possibly in connection with Oahu College. I do not feel that I am conferring on Harold anything but a real benefit to himself, or more particularly for the training of his family, whenever he shall have one, in diverting this property from its use as his home, believing that he would eventually, if not now, agree with me that a quiet and modest home, with his children brought up to work and not to be waited on perpetually by servants, is the truer life for civilized man and woman. [13]

In this connection I desire that my Executors and Trustees, whenever he may marry, shall, whenever he and his wife shall have selected their location for a home, pay an amount toward the same to his wife for such purpose, not to exceed \$10,000.00 (Ten Thousand Dollars), unless this contingency shall have already occurred prior to my decease, in which case this clause is to be void.

I hope that my widow and Harold, in case of my decease, will become warmly interested in the carrying on and eventual success of these plans or dreams and coöperate to the best of their ability; and I believe that the suggestions of both, particularly of Mrs. Castle, would be very valuable.

I hereby declare that nothing herein contained shall be construed to require my Executors and Trustees to engage in or carry on any of the business enterprises herein enumerated; or, if they do carry them on, nothing herein contained shall be construed as limiting their discretion in the ways and means, or the extent to which the same shall be carried on. I wish, and hereby declare that they shall have the widest discretionary powers in continuing or discontinuing said enterprises, or either of them; and in the ways, means and methods of conducting or carrying them on; and of engaging in and conducting any other business enterprise or enterprises, which they, in their discretion, may consider for the best interests of my estate.

I also more particularly give them discretion to abandon the attempt to introduce and settle emigrants of the Northern races, if, after trial thereof,

they, in their sole discretion, shall become convinced that it is impracticable or not successful enough to warrant further expenditure of money.

I hereby specifically authorize and empower my Executors and Trustees to buy, lease or otherwise acquire any property, real, personal or mixed, which, in their discretion, they may deem necessary or proper to carry into effect any of the objects or purposes herein set forth;

And, also, for like purposes, in their sole discretion to sell, convey, exchange or lease either for money, for other property, or by way of compromise, and either for cash or on credit, any property, real, personal or mixed, which may at any time belong to my estate; [14]

And, also, for like purposes, in their sole discretion, to borrow money, on behalf of my estate, either on open account, or on promissory notes as Trustees of my estate, or by pledge or mortgage, either direct or to a Trustee, of the whole or any part of my estate, and either accompanied or not accompanied by coupon bonds, upon such terms and conditions, rates of interest and time or times when payable, as to them shall seem best;

And, also, the power to invest, change investment and reinvest any moneys at any time belonging to my estate, with sole discretion as to the character of such investments;

And I hereby specially direct that my Executors and Trustees shall not be restricted in the character or class of business in which they may engage or the investments which they shall make, to those

ordinarily considered as proper investments for trust estates, but knowing my desires and objects as they do, both from the statements herein made and from my talks with them, they shall have full power and authority to carry out such desires and objects in such manner as, in their sole discretion, they may deem wise and most likely to effectuate such desires and objects, unfettered by the technicalities and control usually incident to the management of trust estates.

I hereby further direct that if, at any time or times, my Executors and Trustees shall, in their sole discretion, deem it wise to pay a special salary to anyone or more of said Executors and Trustees for the purpose of securing special service in addition to the service ordinarily expected from him or them as Executors and Trustees, in addition to the commissions which such Trustee or Trustees would legally receive, they shall have and are hereby given the authority to so employ such Trustee or Trustees and pay said salary or salaries.

I appoint as EXECUTORS AND TRUSTEES, L. A. THURSTON, F. B. McSTOCKER, and D. L. WITHINGTON, and I desire that W. R. CASTLE shall act in the absence or disability of anyone of the Executors or Trustees. I desire that, in case of the decease of anyone of said three Executors the remaining two with W. R. Castle shall appoint his successor. And I [15] authorize my said Executors and Trustees to increase their number to a number not greater than five (5) by the addition of said W. R. Castle or my son Harold K. L. Castle,

when he shall have unquestionably qualified for appointment, or by the addition of such other persons as may be selected by said Executors, said action being evident in writing, and I hope that by the time any vacancy by death shall occur, my said son will then unquestionably be qualified for appointment.

I further direct that my said Executors and Trustees be exempt from giving bond or surety for the faithful performance of their duties either as Executors or Trustees.

IN WITNESS WHEREOF, I have set my hand this 13th day of September, A. D. 1907.

(Sig.) J. B. CASTLE.

Signed, published and declared this 13th day of September, A. D. 1907, as and for his LAST WILL AND TESTAMENT by JAMES B. CASTLE in our presence, who in his presence and in the presence of each other have hereunto signed our names as witnesses.

(Sig.) HARLEAN JAMES,

Residing in Honolulu;

(Sig.) WILLIAM L. CASTLE,

Residing in Honolulu;

I, JAMES BICKNELL CASTLE, within named, hereby make, publish and declare this as a CODICIL to my before written Last Will and Testament, hereby reaffirming and republishing said Last Will and Testament in all respects excepting as herein modified, viz.:

I REVOKE the appointment of F. B. McStocker as Executor and Trustee, and also the clause in said

Will authorizing my said Executors and Trustees to increase their number, and I appoint my son, HAROLD K. L. CASTLE, as an Executor and Trustee in place of said F. B. McStocker, jointly with my other Executors therein named, with like [16] powers and exemption from giving bond or surety; my son having now become unquestionably qualified.

WITNESS my hand this 19th day of August, A. D. 1912.

(Sig.) JAMES BICKNELL CASTLE.

Signed, published and declared, this 19th day of August, A. D. 1912, as and for a CODICIL to his Last Will and Testament, and as and for the republishment of said Last Will and Testament as herein modified, by JAMES BICKNELL CASTLE, in our presence, who, in his presence and in the presence of each other, have hereto signed our names as witnesses.

(Sig.) ALBERT N. CAMPBELL,
Residing in Honolulu;

(Sig.) WILFRID A. GREENWELL,
Residing in Honolulu;

James Bicknell Castle died on the 5th day of April, 1918. His will was admitted to probate, and letters testamentary issued on May 18th, 1918, on which date William R. Castle, Harold K. L. Castle, and David L. Withington were appointed executors.

The renunciation of Harold K. L. Castle of his appointment under the will as Trustee was accepted, and William R. Castle, Lorrin A. Thurston, and David L. Withington were appointed Trustees, April 5th, 1919. [17]

Exhibit "B."**VALUE OF J. B. CASTLE ESTATE.****PERSONAL ESTATE:**

Cash on deposit.....	\$198,588.20
Cash on deposit pledged to purchase of Territorial bonds.....	20,000.00
Cash on deposit pledged to purchase of Liberty Bonds, 3d.....	30,000.00
Life Insurance.....	54,908.19
War Savings Stamps.....	832.00
Credit on Books of Hawaiian Devel- opment Co.....	No value.
Note of Kona Development Co., dated Feb. 28, 1918.....	41,838.18
Note of Kona Development Co., dated Mar. 30, 1918.....	10,911.73
Note of Oahu Shipping Co., Ltd., dated Mar. 7, 1918.....	40,000.00
Note of Thomas Wah King, dated Feb. 28, 1918.....	8,000.00
Note of Eben P. Low, dated Oct. 31, 1917.....	11,328.14
Library.....	6,000.00
Furniture.....	500.00
299 shares Kaneohe Ranch Co.....	75,000.00
399 shares Heeia Agricultural Co., Ltd.....	19,950.00
733 shares Koolau Railway Co., Ltd.	
499 shares Koolau Agricultural Co., Ltd.....	150,000.00
2677 shares Kona Agricultural Co., Ltd.....	12,000.00

63 shares Oahu Shipping Co., Ltd....	777.65
2000 shares Hawaiian Hardwood Co., Ltd.....	1,973.69
5000 shares Western Consolidated Oil Co.....	12,500.00
499 shares Hawaiian Development Co., Ltd.....	1,200.00
20 shares Oahu Country Club.....	No value
	<hr/>
	\$696,307.79

[19]

Brought forward.....\$696,307.79

FREEHOLD ESTATE:

44 acres in Manoa Valley.....	1,800.00
2.96 acres at Koolaupoko, Oahu.....	250.00
282 acres, water rights at Kaipapau, Oahu.....	1,000.00
2.4 acres at Honokua, Kona—1 share and 82 acres of another share of the Hui Aina of Honokua—4.25 acres at Waiea, So. Kona—an un- divided $\frac{2}{3}$ interest in the Ahupuaa of Waiea and 4.5 acres of land at Kalahiki, Kona Hawaii.	8,000.00

LEASEHOLD ESTATE:

A lease from the Trustees of the Es- tate of Bernice P. Bishop to James B. Castle dated Nov. 1906.....	1.00
A lease of certain lands situate in the district of North Kona, Hawaii..	1.00
	<hr/>
	\$707,359.79

[Indorsement]: P. No. 5383. 4/247. Circuit Court, First Circuit Territory of Hawaii. In Probate. At Chambers. In the Matter of the Assessment of the Inheritance Tax on the Estate of James Bicknell Castle, Deceased. Motion and Stipulation. Filed at 11 o'clock A. M., April 9, 1921. (Sgnd.) B. N. Kahalepuna, Clerk. Robertson, Castle & Olson, Frear, Prosser, Anderson & Marx and Harry Irwin, Atty. General. [20]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

IN PROBATE—AT CHAMBERS.

No. 5383.

In the Matter of the Assessment of the Interitance
Tax of the Estate of JAMES BICKNELL
CASTLE, Deceased:

**Motion for Order Assessing and Fixing Value of
Devises and Bequests and the Amount of Tax
to Which the Same are Liable.**

To the Honorable, the Presiding Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in Probate, at Chambers:

Comes now the Territory of Hawaii, by Harry Irwin, Attorney General, and moves the Court that an order be entered in this Court and cause assessing and fixing the value of the devises, bequests and other interests passing under the Will of James Bicknell Castle, deceased, and the inheritance tax

to which the same are liable, pursuant to the provisions of Chapter 96 of the Revised Laws of Hawaii, 1915, as amended, and pursuant to the decree of the Supreme Court of the Territory of Hawaii, dated September 10, 1919 (Supreme Court No. 1186), and heretofore filed in this Court and cause.

This motion is based upon all the papers, files, petitions and records in this Court and cause and upon the stipulation of the parties hereto which is hereto attached and made a part hereof.

Dated, Honolulu, Hawaii, April 9, A. D. 1921.

TERRITORY OF HAWAII.

By (Sgnd.) HARRY IRWIN,
HARRY IRWIN,
Attorney General. [21]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

IN PROBATE—AT CHAMBERS.

No. 5383.

In the Matter of the Assessment of the Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

Answer of Respondent Harold K. L. Castle to Motion of Territory of Hawaii for Order Assessing and Fixing Value of Devises and Bequests and the Amount of Tax to Which the Same are Liable.

Comes now Harold K. L. Castle, by his attorneys,

Frear, Prosser, Anderson & Marx, and for answer to the above-described motion of the Territory of Hawaii represents and alleges that no inheritance tax is due to the Territory of Hawaii from him on the life income bequeathed to him by the will of the above-named James Bicknell Castle, deceased, under and pursuant to the decree of the Supreme Court of the Territory of Hawaii dated September 10, 1919, heretofore filed in this court and cause.

Dated Honolulu, Hawaii, April 12, 1921.

HAROLD K. L. CASTLE,

By (Sgnd.) FREAR, PROSSER, ANDER-
SON & MARX,

His Attorneys.

[Indorsement]: No. 5383. Reg.—, Pg. —. Circuit Court, First Circuit, Territory of Hawaii. In the Matter of the Assessment of the Inheritance Tax on the Estate of James Bicknell Castle, Deceased. Answer. Filed April 12, 1921 at 1:25 P. M. (Sgnd.) B. N. Kahalepuna, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, Attorneys for Harold K. L. Castle.
[22]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

IN PROBATE—AT CHAMBERS.

No. 5383.

In the Matter of the Assessment of the Inheritance
Tax on the Estate of JAMES B. CASTLE,
Deceased.

Answer of Executors and Trustees.

MOTION FOR ORDER ASSESSING AND FIX-
ING VALUE OF DEVISES AND BE-
QUESTS AND THE AMOUNT OF TAX TO
WHICH THE SAME ARE LIABLE.

COMES now the Executors under the Will of James Bicknell Castle, late of Honolulu, deceased, namely, W. R. Castle and Harold K. L. Castle, and the Trustees under said will, namely, W. R. Castle, L. A. Thurston and Alfred L. Castle, by their attorneys, Robertson, Castle & Olsen, and for answer to the motion for an order assessing and fixing the values of devises and bequests under said will, and the amount of tax to which the same are liable, deny that either the said Executors, the said Trustees or the estate of said James Bicknell Castle are liable for any tax at all, and allege that the tax on the life income bequeathed to Harold K. L. Castle, if any such is payable, is payable by the said Harold K. L. Castle, that there is no tax due on the dower interest, and that the rest and residue of the estate is not liable to any

tax under the provisions of Section 1324 Revised Laws of Hawaii, 1915.

W. R. CASTLE and
HAROLD K. L. CASTLE,
Executors Under the Will of James Bicknell
Castle, Deceased, and

W. R. CASTLE,
L. A. THURSTON and
ALFRED L. CASTLE,
Trustees Under Said Will.

By (Sgnd.) ROBERTSON, CASTLE,
OLSEN,

Their Attorneys.

Dated Honolulu, April 12th, 1921.

Service by copy is hereby admitted this 12th day
of April, 1921.

(Sgnd.) HARRY IRWIN,
Attorney General. [23]

(Sgnd.) FREAR, PROSSER, ANDER-
SON & MARX,

Attorneys for H. K. L. Castle.

[Indorsement]: P. No. 5383. Circuit Court,
First Circuit, Territory of Hawaii. In the Matter
of the Assessment of the Inheritance Tax on the
Estate of James Bicknell Castle, Deceased.
Answer of Executors and Trustees. Filed
at 11:35 A. M. April 12, 1921. (Sgnd.)
B. N. Kahalepuna, Clerk. Robertson, Castle &
Olsen, 125 Merchant St., Honolulu, Attorneys for
Executors and Trustees. [24]

Tuesday, April 12, 1921.

Court Convened at Chambers at 2 o'clock P. M.

Present: Hon. JAMES J. BANKS, Third
Judge Presiding, WILLIAM HOOPAI, Clerk.

P. 5383.

In the Matter of the Assessment of the Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

Hearing.

Granted.

MOTION FOR ORDER ASSESSING AND FIX-
ING VALUE OF DEVISES AND BE-
QUESTS AND THE AMOUNT OF TAX TO
WHICH THE SAME ARE LIABLE.

HARRY IRWIN, Esq., Attorney for Territory.

A. L. CASTLE, Esq., Attorney for James B.
Castle Est.

R. B. ANDERSON, Esq., Attorney for Harold
K. L. Castle.

After statements and arguments of respective
counsel, the Court granted motion, decision to be
filed later.

* * * * *

At 2 o'clock P. M. the Court took a recess at
Chambers.

By order of the Court:

(Sgnd.) WILLIAM HOOPAI,

Clerk. [25]

Wednesday, April 20th, 1921.

At Chambers—2 o'clock P. M. Present: Hon.
JAMES J. BANKS, Third Judge Presiding;
WILLIAM HOOPAI, Clerk.

P. 5383.

In the Matter of the Assessment of the Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

Decision—Decree.

Filed.

HARRY IRWIN, Esq., Attorney for Territory.
A. L. CASTLE, Esq., Attorney for James B. Castle.
R. B. ANDERSON, Esq., Attorney for Harold
K. L. Castle.

The Court this day rendered its decision in writing and signed the decree directing payment of tax.

At 2:00 o'clock the Court took a recess at Chambers.

By order of the Court:

(Sgnd.) WILLIAM HOOPAI,
Clerk. [26]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

IN PROBATE—AT CHAMBERS.

No. 5383.

In the Matter of the Assessment of the Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

Decree Directing Payment of Tax.

Upon the motion of the Attorney General of Hawaii, heretofore filed herein on the 9th day of April, 1921, the answers of the executors and trustees and of Harold K. L. Castle, the stipulation of all parties in interest filed herein on the 9th day of April, 1921, and the decision and order entered in this court and cause on the 20th day of April, 1921, fixing the tax upon the transfer of the property of the above named decedent,

It is ORDERED AND DECREED that W. R. Castle and Harold K. L. Castle, as the Executors under the Will of James Bicknell Castle, deceased, and W. R. Castle, L. A. Thurston and A. L. Castle as Trustees under the Will and of the Estate of James Bicknell Castle, deceased, make payment forthwith to the Treasurer of the Territory of Hawaii of the sum of \$19,655.86, being the amount of tax upon the value of the estate transferred to the said Trustees by the Will of the said Testator, together with interest thereon at the rate of 7% per annum from October 8, 1919.

Honolulu, Hawaii, April 20, 1921.

(Sgnd.) JAS. J. BANKS,

Third Judge of the Circuit Court of the
First Judicial Circuit. [27]

Approved as to form.

(Sgnd.) ROBERTSON, CASTLE, OL-
SON,

Attorneys for Executors and Trustees.

(Sgnd.) FREAR, PROSSER, ANDER-
SON & MARX,

Attorneys for Harold K. L. Castle.

(Sgnd.) HARRY IRWIN,

Attorney General of Hawaii.

[Indorsement]: Circuit Court, First Circuit,
Territory of Hawaii. In Probate—At Chambers.
No. 5383. In the Matter of the Assessment of the
Inheritance Tax on the Estate of James Bicknell
Castle, Deceased. Decision and Decree. Filed at
1:45 o'clock P. M. April 20, 1921. B. N. Kahale-
puna, Clerk. Office of Attorney General, Territory
of Hawaii, Honolulu, T. H. [28]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

IN PROBATE—AT CHAMBERS.

No. 5383.

In the Matter of the Assessment of the Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

**Decision on Motion of Territory of Hawaii for
Order Assessing and Fixing the Value of
Devises and Bequests and the Amount of Tax
to Which the Same are Liable.**

This matter coming on to be heard on the 12th day of April, 1921, upon the motion of the Territory of Hawaii for an order assessing and fixing the value of devises and bequests under the Will of James Bicknell Castle, deceased, and the amount of tax to which the same are liable, upon the answers of the Executors and Trustees under the Will of said Testator and of Harold K. L. Castle, and upon the stipulation of all the parties in interest in this matter, all on file herein, and it appearing therefrom that the residuary clause of the Will of the said Testator transferred the entire estate (with the exception of that part of the estate known as Mahuilani) to the executors and trustees, whose names appear in and who are parties to said stipulation, and it further appearing from said stipulation that the value of the property so transferred to the said executors and trustees by the said residuary clause of the said Will, after making all proper and necessary deductions therefrom amounts to the sum of \$317,244.11; and it further appearing from the decree of the Supreme Court of the Territory of Hawaii, dated September 10, 1919, heretofore filed in this Court and Cause and referred to in said motion, that no inheritance tax is due to the [29] Territory of Hawaii from said Harold K. L. Castle on the life interest bequeathed to him

by said Will, but that the inheritance tax on all of said residuary estate should be paid to the Territory of Hawaii by said executors and trustees.

It is therefore ORDERED AND ADJUDGED that the cash value of the property so transferred to the said executors and trustees by the terms of the said Will, the transfer of which is subject to the tax imposed by Chapter 95 of the Revised Laws of Hawaii, 1915, as amended by Act 223 of the Session Laws of 1917, is the sum of \$317,244.11, and that the tax to which the said transfer is liable and which should be paid by said Executors and Trustees amounts to the sum of \$19,655.86, with interest thereon at the rate of 7% per annum from October 8, 1919.

Honolulu, Hawaii, April 22, 1921.

(Sgnd.) JAS. J. BANKS, (Seal)

Third Judge of the Circuit Court of the First
Judicial Circuit. [30]

In the Supreme Court of the Territory of Hawaii.
OCTOBER TERM, 1918.

In the Matter of the Estate of JAMES BICK-
NELL CASTLE, Deceased.

No. 1179.

In the Matter of the Assessment of the Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

No. 1186.

Appeals from Circuit Judge, First Circuit. Hon.

W. H. HEEN, Judge.

Argued August 26, 1919. Decided September 6, 1919.

KEMP and EDINGS, JJ., and Circuit Judge

DeBOLT in Place of COKE, C. J., Absent.

Taxation—Inheritance tax—Dower.

The estate which a widow takes in the property of her deceased husband as her dower does not pass to her by virtue of the intestate laws and is not subject to the inheritance tax which is chargeable only upon property which shall pass by will or by the intestate laws of this Territory.

Same—Same—Charitable and educational trusts.

A devise to trustees in order to be exempt from an inheritance tax as being for or to be devoted to a charitable or educational purpose must be by the terms of the will given up wholly to such charitable or educational purpose. [31]

Same—Same—Annuity.

Where an estate is devised to trustees and such trustees are charged with the duty of paying out of such estate certain annuities, the annuities as such are not subject to the inheritance tax. [32]

Opinion of the Court by Kemp, J.

James Bicknell Castle, late of Honolulu, died on April 8, 1918, leaving a will made in September, 1907, which was admitted to probate on May 18,

1918, by which he disposed of his estate. On April 21, 1919, during the pendency of proceedings for the approval of the final accounts of the executors, the attorney general, on behalf of the Territory of Hawaii, intervened and moved for the appointment of appraisers of the estate for inheritance tax purposes, to the end that the inheritance tax due upon (a) the dower estate passing to the widow, (b) the estate transferred to the trustees, and (c) the life income passing to the son, Harold K. L. Castle, might be definitely ascertained. When the said motion was presented to the probate court having jurisdiction of the cause it was suggested by counsel that as a preliminary to the granting of the motion for the appointment of appraisers it should first be decided by the Court whether any tax was due and payable from any person or persons upon any part of the estate transferred by said will or otherwise. Of course if it should be decided that no tax is due there would be no necessity for the appointment of appraisers and the motion presented by the attorney general would necessarily have to be denied. This procedure was agreed to by all parties and the question as to whether any tax is due from either the widow, the son, or the trustees, was argued and presented to the probate court. The probate judge ruled (a) that no tax was due upon that portion of the estate which passed to the widow by way of dower, she having duly elected to take by way of dower rather than under the will, (b) that no tax was due upon the *corpus* of the estate which by the will was transferred to the

trustees for the reason that the will created a valid, charitable trust and conveyed the remainder of the estate [33] to the trustees for the purpose of carrying out the terms of the charitable trust, and (c) that a tax was due upon the life income which under the will was transferred to Harold K. L. Castle, the son. The probate judge allowed the Territory an interlocutory appeal from the first two rulings and allowed Harold K. L. Castle, the son, an interlocutory appeal from the last ruling as above set forth.

At the hearing on appeal the attorney general has confessed error in the ruling of the circuit judge to the effect that the annuity to Harold K. L. Castle is subject to a tax to be paid out of said annuity. In this we concur and in line with the holding of *Estate of Brown*, 24 Haw. 443, hold that as the residuary clause of the will transfers the entire estate (with the exception of the estate known as Mahuilani on Haleakala, Maui, which is devised to Julia White Castle), to the executors and trustees, the inheritance tax (if any is due) must be paid by the executors and trustees out of the *corpus* of the estate. The residuary clause of the will is in part as follows:

“All the rest of my estate, real, personal and mixed, I devise and bequeath to my executors and trustees hereinafter named, for the following purposes:

“First. For the payment of my just debts and funeral expenses.

“Second. For the following uses and purposes which I will explain in some detail.

“I want the business represented by the Hawaiian Development Company, Limited, to go on in the same way as though I were here. The general plans of development in Kona and Koolau are very familiar to Mr. McStocker and in a broad, general way, to Mr. Withington and Mr. Thurston. I have gone into these various enterprises prepared, if necessary for their successful establishment, to hypothecate all of my securities; but, preferably to the continued burden of heavy indebtedness, as rapidly as full value may be obtained, by selling some of my old securities, to convert the same into the new enterprises.

“In line with this, it is my present intention, and in case of my decease I desire my executors and trustees, if in their discretion it seem best, to convert two thousand (2,000) shares of Alexander & Baldwin, Limited, stock into cash, provided it can be sold for not less than two hundred dollars (\$200.00) per share, putting the same into Kona investments, preferably West Hawaii Railroad Company, and into the Koolau Railway Company, [34] either or both. After the Kona Development Company and the sugar enterprise which I have planned to mature from the Heeia Agricultural and Koolau Companies' properties shall have become successfully established, I do not wish to expand any further in sugar, but only so far

as each mill may become the central factory for the manufacture of sugar from the cane bought of small growers.

“I do not bind my executors to follow the line of development above indicated, but mean to confer upon them the widest discretion as to investment and development. * * *

“My general aim in this whole matter is not to accumulate a great estate for my family or heirs beyond conserving the estate which I now possess and which may be conservatively valued as worth between a million and a million and a half, but to devote any increase thereof to the purposes hereinafter indicated.

“I desire my executors to appropriate fifteen hundred dollars (\$1500) a month to my widow, that being about the amount necessary to maintain Kainalu, Mahuilani and Puuokoa, Tantalus, if she so desires: that is to say, I desire to have nothing less than this paid to my widow for that purpose, or, if she desires, to apply to her other uses, so long as embarrassing financial conditions do not prevent. Subject to the like qualification, that is, so long as such would not shorten the above named fifteen hundred dollars (\$1500.00) a month being paid to my widow, I desire to continue the payments which I now am making to an old friend and teacher in New York, Mrs. H. K. Hovey, whose present address is No. 7 West 108th Street, New York, two hundred dollars (~~4~~200.00) quarterly; and I desire to pay to Dr. T. M. Coan, present ad-

dress 70 Fifth Avenue, New York City, one hundred and fifty dollars (\$150.00) quarterly, for as long as each lives. I desire to assist Dr. N. B. Emerson in his literary work to such extent as may be necessary, not to exceed six hundred dollars (\$600.00) a year during his life.

“With the successful and profitable establishment, however of the various enterprises involved, with the requisite income subsequent thereon, I desire to have the amount paid to my widow out of the estate from its income increased to a sum not to exceed forty thousand dollars (\$40,000.00) per annum.

“Upon the decease of my wife, Julia White Castle, I desire to continue an income to my son H. K. L. Castle, subject to the following conditions: The minimum not to be less than five thousand dollars (\$5,000.00) per annum unless caused by financial embarrassment or inconvenience (of which the trustees shall be the absolute judges); the maximum not to exceed forty thousand dollars (\$40,000.00) per annum, which forty thousand dollars (\$40,000.00) shall include the income which he may be receiving from any property which I may give him prior to my decease, including the income from the one thousand (1,000) shares of stock in Alexander & Baldwin, Limited, herein mentioned, together with that derived from property derived from his mother.

“Should the development of the estate be

such as to justify the expansion into other or related lines of business than those already initiated, of which condition my executors, or a majority thereof, are fully empowered, without qualification, to decide, and its expansion through establishment of other enterprises in harmony with the ultimate object of my remaining in active business, namely, to accumulate sufficient land and capital to systematically establish an effort to introduce a high-class agricultural immigration of northern races, preferably Scandinavian, Anglo-Saxon and Teutonic, then I desire them to expand into such enterprises without hesitation and I hereby empower them amply herein for the purpose. * * * [35]

“After the fulfillment of the requirements upon the estate as above set forth, I desire to have any excess of income, and after the decease of my said wife and son and said other beneficiaries before named, the whole income (always subject to the decision of the executors to devote same to any business enterprises whatsoever which they may approve) to accumulate toward an educational purpose to be initiated at such time as their judgment will determine the estate amply able to carry on without closing its commercial character.”

What the testator terms his strong desire as to the nature of the work he hopes to have such school accomplish is set forth in a lengthy statement in which, after expressing the belief that individuals, com-

munities and nations are depraved and weakened by the excessive accumulation of wealth and that luxury furnishes fertile soil for their decay, he expresses the further belief that the counteraction of this influence must be accomplished, if at all, through some method of education different from that employed by established schools. The problem which he desires such school to solve is, how may provision be made for the children of the well-to-do to receive that training in the habits of work and duty which necessity provides for the children of the poor? He suggests to his trustees that in order to accomplish this end the school should be a co-educational, agricultural and domestic science school located in the country; that it should be exclusively a boarding school and not a day school; that every student should be obliged to earn a certain definite proportion of his or her training and education; that the tuition charged should be nominal, the school to become a productive farm, and the endowment calculated to meet the deficit after full value has been credited for the products of such farm.

Under our statute all property which shall pass by will or by the intestate laws of this Territory from any person who may die seized or possessed of the same while a resident of this Territory is subject to the interitance tax. Chapter 96, R. L. 1915. It is provided, however, in said chapter that "All property [36] transferred * * * to any person, society, corporation, institutions, or associations of persons in trust for or to be devoted to any charitable, benevolent, educational, or public pur-

pose, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property, or to the income thereof, shall be exempt from this tax'' (sec. 1324).

It is claimed by the executors and trustees, and disputed by the attorney general, that the devise to them creates a trust for or to be devoted to an educational purpose and is therefore exempt, under the section above quoted, from the payment of the tax.

Julia White Castle, the widow of the testator, waived the provision made for her in the will and elected to take her dower, and the attorney general claims for the Territory the tax upon the dower which is disputed by the widow.

Our statutory dower is not the ordinary common law dower which was limited to a part of the real estate in which the husband had during the marriage an estate of inheritance, but is by the statute extended to include leasehold and freehold estates so held by the husband during the marriage and is also extended by the statute so as to give the wife "by way of dower" an absolute property in one-third part of all her husband's movable effects in possession or reducible to possession at the time of his death after the payment of all his just debts. Sec. 2977, R. L. 1915.

In order to determine whether the estate which the widow is given by the above statute is subject to an inheritance tax it must be determined whether it passes to her upon the death of her husband by

virtue of "the intestate laws of this Territory," as there is no other expression in the inheritance tax law which could possibly make the tax apply to it. A determination of the [37] nature of the estate which the wife has in her husband's estate by virtue of this statute will aid us in the solution of this question.

In *Carter vs. Carter*, 10 Haw. 687, 694, Mr. Justice Frear, afterwards chief justice, in discussing the nature of the estate created by this section of our statute, speaking for the Court said:

"That the estate in question was intended to be a dower estate is clear, because, (1) it is not limited to cases of intestacy; (2) it is expressly said to be 'by way of dower'; (3) it is coupled in the same section and sentence with dower in real estate, of which there can be no question; (4) it is part of an article entitled 'Of Dower'; (5) this article is part of a chapter entitled 'Of Husband and Wife,' which contains three articles entitled respectively 'Marriage,' 'Of Dower,' and 'Of Divorce and Separation,' thus showing that the estate was intended to be by virtue of the marriage relation, as a marital right, and not an estate of inheritance which naturally belongs and is put by the statute in an entirely different category; (6) the history of the law confirms this view, for when first passed in 1846, four years before the statute of descents was passed and thirteen years before the passage of the Civil

Code of which it is now a part, it was made, with the subjects of marriage and divorce, a subdivision of the chapter defining the duties of governors who then had special charge and jurisdiction over such matters while questions of descent were left to the ordinary courts, and the substance of the section in question was then part of a section under the article relating to marriage and immediately followed this section (afterwards section 1286 of the Civil Code) which defined the marital rights of the husband, and was part of a section which also defined the other marital rights of the wife (afterwards section 1287 of the Civil Code), and it there expressly described the estate as going to the wife 'in virtue of her marriage' as well as 'by way of dower' and inseparably connected it with the dower estate in real property, by having the words 'The wife shall be entitled to' in place of the words 'Every woman shall be endowed of,' found in the first part of 1299, and merely the word 'and' in place of the words 'she shall also be entitled,' found at the beginning of the latter half of the section."

The effect of this is to hold that the nature of the estate which the wife has by way of dower under this statute is the same as the common-law dower, so that anything that may be said of common-law dower is equally applicable to this estate. A dower right is an interest in real estate not subject to the testator's disposition and is therefore not a transfer of or a [38] succession to property of her hus-

band. It is property which exists inchoately during her husband's lifetime under the laws applicable to intestacy. *McDaniel vs. Byrnett*, 120 Ark. 295, 179 S. W. 491, 493.

The term "intestate laws" is found in most of the state statutes creating the special tax upon inheritance and has generally been held to include or refer to the statutes of descent and distribution, and not to statutes defining the estate which the wife has or may take by way of dower. In *re Page's Estate*, 79 N. Y. S. 382; *McDaniel vs. Byrnett*, *supra*. In *Ross on Interitance Taxation*, sec. 56, it is said: "It is true that dower had its origin and continuance by force of the law and depends upon the husband's death for its consummation. But it is quite another thing to suppose that the estate is dependent upon the law of succession or owes its existence to any such transfer as the inheritance tax statutes contemplate. Dower comes to the wife by virtue of the marriage, and the death of the husband serves only to consummate not to transmit it. The law that confers dower on the widow is not the law that appoints the inheritance property of a decedent to designated heirs."

It is true that in North Carolina and Illinois the opposite view is taken and the term "intestate laws" held to include the statute defining the estate which the wife takes by way of dower. *Corporation Commission vs. Dunn*, 174 N. C. 679; *Billings vs. The People*, 189 Ill. 472. But we think that the better reason, as well as the weight of authority, favors the view that the term does not include the dower

statute and that the wife's dower does not pass to her by virtue of the intestate laws. For further authorities in support of our view, see *Crenshaw vs. Moore*, 124 Tenn. 528, 34 L. R. A. (N. S.) 1161; *In re Bullen's Estate*, 47 Utah, 96; *Succession of Marsal*, 18 La. 211, 42 So. 778; *In re [39] Weiler's Estate*, 122 N. Y. S. 608; *In re Estate of Strahan*, 93 Neb. 828, 142 N. W. 678.

This brings us to the question of whether the devise to the executors and trustees or any part of it is subject to the tax.

The attorney general has argued that the devise violates the rule against perpetuities, but we do not deem it necessary to decide this question as we think the question of whether the devise is taxable can be adequately disposed of without so doing.

If the property transferred to them is transferred in trust for or to be devoted to a charitable or educational purpose it is, by virtue of the provisions of section 1324 above quoted, exempt from the tax. If it does not come within this exemption it is subject to the tax.

The commonly accepted meaning of the word "devoted," and as defined by Webster is, "to give up wholly." If we accept this definition of the word used in the statute the property transferred to the executors and trustees by the terms of the will must be "given up wholly" to the educational purpose defined in the will to bring it within the statutory exemption. "In the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary signification. It is a

very well-settled rule that so long as the language used is unambiguous a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy; and it is the plain duty of the Court to give it force and effect." 38 Cyc. 1114.

We think that it is clear from a reading of the will that the first purpose for which the devise is made to the executors and trustees, and to accomplish which the whole income may be used, is to provide an income not to exceed forty thousand dollars [40] per annum for the testator's widow during her life and after her death to continue such income to his son H. K. L. Castle. It is true that the testator says that he wants certain railroad and development schemes in which he was interested to go on in the same way as though he were here, but he says that his aim in this respect is not to accumulate a great estate for his family or heirs beyond conserving the estate which he then possessed, but to devote any increase thereof to the purposes thereafter indicated. Immediately after this provision in the will he directs his executors to pay to his widow and after her death to his son the annuity above referred to, and next directs that, under certain conditions in harmony with the ultimate object of his remaining in active business of which his executors are to be the judges, land and capital be accumulated to systematically establish an effort to introduce into this Territory a high class agricultural immigration of northern races, preferably Scandinavian, Anglo-Saxon and Teutonic.

Following the provisions above detailed are the provisions relative to initiating the educational purpose set out in the last paragraph quoted from the will in the first part of this opinion.

It is significant that the testator directs that the accumulation for the educational purpose is to begin "after the fulfillment of the requirements upon the estate as above set forth."

It has been argued that the annuity to H. K. L. Castle may never become payable as the will provides that it is to begin after the death of his mother and she may survive him; that his mother having waived the provision made for her in the will and elected to take her dower, no part of the property transferred [41] may ever be devoted to providing such annuity. But we think the election of the widow to take her dower operated to accelerate the provision in favor of the son and to make his annuity immediately a charge upon the estate. *Lidgate vs. Danford*, 23 Haw. 317, 327; *Slocum vs. Hagaman*, 176 Ill. 533; *Trustees Church Home vs. Morris*, 99 Ky. 317; *In re Schulz's Estate*, 113 Mich. 592.

When a widow elects to take her dower instead of accepting the provisions of the will, the general rule, as announced by authorities already cited, is that the legacies which were to have been effective at her death became immediately due, unless a contrary intention of the testator is manifest. We can see nothing in the will before us which manifests such intention. The only reason we can conceive for the postponement of the annuity to the son

until the death of the widow was that she might be provided for to the full extent contemplated and when that reason for postponement ceased, as it did upon her election to take her dower, we can see no reason why the next object of the testator's bounty should be delayed in its enjoyment. It is also to be noted that since the widow elected to take her dower and thereby diminished by one-third the *corpus* of the estate, it is not improbable that the estate will be unable to pay to the son the maximum income authorized by the will and it will be only just that he be compensated for this impairment of the estate by receiving his annuity for a longer period of time.

We conclude that the devise to the executors and trustees is not to be devoted to the educational purpose in the sense in which the statute contemplates it should be to entitle it to the exemption and is therefore subject to the tax.

The ruling subjecting the annuity of H. K. L. Castle to the tax, and from which he has appealed, is reversed. The ruling that the widow's dower is not subject to the tax and the [42] ruling that the devise to the executors and trustees constitutes a charitable trust, from which rulings the Territory has appealed, are as to the first affirmed, and as to the second, reversed, and the cause remanded for further proceedings consistent with this opinion.

H. IRWIN, Attorney General, for the Territory.

A. WITHINGTON (CASTLE & WITHINGTON on the brief), for the executors.

F. M. HATCH, for Julia White Castle and H. K. L. Castle.

(Signed) S. B. KEMP.

(Signed) W. S. EDINGS.

(Signed) J. T. DeBOLT.

[Endorsed]: No. 1179. Supreme Court, Territory of Hawaii. October Term, 1918. In the Matter of the Assessment of the Inheritance Tax on the Estate of James Bicknell Castle, Deceased. Opinion. Filed September 6, 1919, at 10:45 A. M. Robert Parker, Jr., Assistant Clerk. [43]

In the Supreme Court of the Territory of Hawaii.
In the Matter of the Assessment of Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

Application for Writ of Error.

To the Clerk of the Supreme Court:

Please issue a writ of error in the above-entitled case to the Clerk of the Circuit Court of the First Judicial Circuit, which case is No. 5383 and decree thereon entered April 20, 1921, on behalf of William R. Castle and Harold K. L. Castle, Executors under the Will of said James Bicknell Castle and William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of said James Bicknell Castle, returnable to the Supreme Court.

Dated, Honolulu, T. H., May 16th, 1921.

WILLIAM R. CASTLE and
HAROLD K. L. CASTLE,
Executors Under the Will of James Bicknell Castle.

WILLIAM R. CASTLE,
LORRIN A. THURSTON and
ALFRED L. CASTLE,
Trustees Under the Will of James Bicknell Castle.
By (Signed) ROBERTSON, CASTLE &
OLSON,

Their Attorneys.

[Endorsed]: No. 1332. Supreme Court, Territory of Hawaii. In the Matter of the Assessment of Inheritance Tax on the Estate of James Bicknell Castle, Deceased. Application for Writ of Error. Filed May 16, 1921, at 9:20 A. M. J. A. Thompson, Clerk. Robertson, Castle & Olson, Attorneys for Plaintiffs in Error. [44]

In the Supreme Court of the Territory of Hawaii.
In the Matter of the Assessment of Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

Assignments of Error (Copy).

Now come William R. Castle and Harold K. L. Castle, Executors of the Will of James Bicknell Castle, deceased, and William R. Castle, Lorrin A.

Thurston and Alfred L. Castle, trustees under the will of James Bicknell Castle, deceased, plaintiffs in error in the above-entitled cause, and say there is manifest error in the record of proceedings before the Third Judge in said First Judicial Circuit, Territory of Hawaii, to wit:

1. That it was error to render and enter the decree in said cause directing the payment by the plaintiffs in error of a tax of \$19,655.86 and interest thereon at 7% from October 8, 1919.

2. That it was error to hold the residuary bequest in said will given to said trustees was subject to a territorial inheritance tax.

3. That it was error to hold that a territorial inheritance tax upon the annuity of Harold K. L. Castle should be paid out of the residue of the estate.

WHEREFORE the said plaintiffs in error pray that for the errors aforesaid the said decree of the said Circuit Court be reversed, annulled and for naught held, and this cause be remanded to said Circuit Court with directions that said errors [45] be corrected, to the end that justice may be done in the premises.

Dated, Honolulu, T. H., May 16th, 1921.

(Signed) ROBERTSON, CASTLE &
OLSON,

Attorneys for Plaintiffs in Error.

NOTICE.

To the Territory of Hawaii, and its Attorney General; Harold K. L. Castle, and his Counsel, Frear, Prosser, Anderson & Marx:

Notice is hereby given that application has been filed with the clerk of the Supreme Court of the Territory of Hawaii for a writ of error in the above-entitled cause.

(Signed) ROBERTSON, CASTLE &
OLSON,

Attorneys for Plaintiffs in Error.

CERTIFICATE OF SERVICE.

I, Arthur Withington, hereby certify that on May 16, 1921, I served a copy of the above assignments of error and notice upon Joseph Lightfoot, deputy attorney general, and Frear, Prosser, Anderson & Marx, counsel for H. K. L. Castle, the Trustees and H. K. L. Castle being the defendants in error in the above cause.

(Signed) ARTHUR WITHINGTON,
Of Counsel for Plaintiff in Error.

[Endorsed]: No. 1332. Supreme Court, Territory of Hawaii. In the Matter of the Assessment of Inheritance Tax on the Estate of James Bicknell Castle, Deceased. Assignments of Error. Filed May 16, 1921, at 9:20 A. M. J. A. Thompson, Clerk. Issued for Service May 16, 1921, at 10:45 A. M. J. A. Thompson, Clerk. Returned May 16, 1921, at 11:43 A. M. J. A. Thompson,

Clerk. Robertson, Castle & Olson, Attorneys for
Plaintiffs in Error. [46]

In the Supreme Court of the Territory of Hawaii.
WRIT OF ERROR.

In the Matter of the Assessment of Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

Bond on Writ of Error (Copy).

KNOW ALL MEN BY THESE PRESENTS:
That we, William R. Castle and Harold K. L. Castle, Executors under the Will of James Bicknell Castle, and William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, as principals, and A. N. Campbell and F. E. Steere as sureties, are held and firmly bound unto the Territory of Hawaii and Harold K. L. Castle, jointly and severally, in the sum of Twenty Thousand Dollars (\$20,000), for the payment of which, well and truly to be made, we bind ourselves, our successors, executors and administrators, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS
AS FOLLOWS:

WHEREAS, in the above-entitled cause judgment was given against the said William R. Castle and Harold K. L. Castle, Executors under the Will of James Bicknell Castle, and William R.

Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle in favor of the Territory of Hawaii and Harold K. L. Castle; and

WHEREAS, said William R. Castle and Harold K. L. Castle, Executors under the Will of James Bicknell Castle, and William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, have petitioned that a writ of error be granted to them because of certain alleged errors in the judgment, [47] decision and errors occurring at the trial of said cause;

NOW, THEREFORE, if the said William R. Castle and Harold K. L. Castle, Executors under the Will of James Bicknell Castle, and William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, shall pay or cause to be paid the said judgment in said original cause in case they fail to sustain the said writ of error, this obligation shall be void; otherwise to be in full force and effect.

IN WITNESS WHEREOF said William R. Castle and Harold K. L. Castle, Executors under the Will of James Bicknell Castle, and William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, as principals, and A. N. Campbell and F. E. Steere,

as sureties, have set their hands this 13th day of May, 1921.

Executors under the Will of James B. Castle:

(Signed) WILLIAM R. CASTLE,

(Signed) HAROLD K. L. CASTLE,

Principals.

(Signed) WILLIAM R. CASTLE,

Trustees Under the Will of James B. Castle:

(Signed) L. A. THURSTON,

(Signed) ALFRED L. CASTLE,

Principals.

(Signed) A. N. CAMPBELL,

(Signed) F. E. STEERE,

Sureties.

[48]

Territory of Hawaii,

City and County of Honolulu,—ss.

A. N. Campbell and F. E. Steere, being severally duly sworn, each for himself deposes and says: That he is the surety named in the foregoing bond and whose name is subscribed thereto; that he has property situated within the Territory of Hawaii subject to execution, and that he is worth in property within said Territory the amount of the penalty specified in said bond over and above all his debts and liabilities.

(Signed) A. N. CAMPBELL,

(Signed) F. E. STEERE,

Subscribed and sworn to before me this 13th day of May, 1921.

[Seal] (Signed) MILLIE F. RAWLINS,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

In the above-entitled matter the amount of the bond is fixed at \$20,000, and the foregoing bond is approved.

[Seal] (Signed) JAMES L. COKE,
Chief Justice of the Supreme Court of the Terri-
tory of Hawaii.

[Endorsed]: No. 1332. Supreme Court, Terri-
tory of Hawaii. In the Matter of the Assessment
of Inheritance Tax on the Estate of James Bick-
nell Castle, Deceased. Bond on Writ of Error.
Filed May 16, 1921, at 9:20 A. M. J. A. Thomp-
son, Clerk. Robertson, Castle & Olson. [49]

In the Supreme Court of the Territory of Hawaii.
In the Matter of the Assessment of Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

Writ of Error (Copy).

To the Clerk of the Circuit Court of the First Ju-
dicial Circuit, Territory of Hawaii.

Application having been made on behalf of Will-
iam R. Castle and Harold K. L. Castle, Executors
under the Will of James Bicknell Castle, and Will-

iam R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, for a writ of error in the above-entitled case, you are commanded forthwith to send to the Supreme Court the record in said case.

Witness the Honorable JAMES L. COKE, Chief Justice of the Supreme Court this 16th day of May, 1921.

[Seal] (Signed) J. A. THOMPSON,
Clerk of the Supreme Court.

Received the above writ of error on this 16th day of May, 1921, at 10:30 o'clock A. M.

(Signed) WILLIAM HOOPAI,
Clerk Circuit Court First Circuit.

To the Clerk of the Supreme Court:

The execution of the within writ of error appears by the record hereto annexed.

Dated, Honolulu, T. H., May 26, 1921.

(Signed) WILLIAM HOOPAI,
Clerk of the Circuit Court of the First Judicial
Circuit, Territory of Hawaii.

[Endorsed]: No. 1332. Supreme Court, Territory of Hawaii. In the Matter of the Assessment of Inheritance Tax on the Estate of James Bicknell Castle, Deceased. Writ of Error. Filed May 16, 1921, at 9:30 A. M., and Issued Same. Returned May 26, 1921, at 2:35 P. M. Robert Parker, Jr., Assistant Clerk. Robertson, Castle & Olson, Attorneys for Plaintiffs in Error. [50]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1920.

In the Matter of the Assessment of Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

No. 1332.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

Hon. J. J. BANKS, Judge.

Argued September 23, 1921. Decided October 1,
1921.

KEMP and EDINGS, J. J., and Circuit Judge
DeBOLT in Place of COKE, C. J., Absent.

Appeal and Error—Decree affirmed when in con-
formity with former decision.

The decree of a Circuit Judge rendered in con-
formity with a decision of this Court upon a
former appeal of the same case will be af-
firmed.

Opinion of the Court by Kemp, J.

Plaintiffs in error seek to reverse a decree of
the Circuit Judge at chambers in probate requir-
ing the executors and trustees of the estate of
James Bicknell Castle, deceased, to pay to the
treasurer of the Territory of Hawaii the sum of
\$19,655.86, being the amount of tax upon the value
of the estate transferred to said trustees by the
will of the said testator, together with interest

thereon at the rate of seven per cent per annum from October 8, 1919.

Only two questions are presented by the assignments of error: (1) Is the annuity to Harold K. L. Castle under the terms of the will a taxable transfer payable by him out of said annuity, and (2) is the transfer to the trustees a taxable transfer within the meaning of our inheritance tax statute? [51]

Both of these questions were fully considered by us when this same case was before us on an interlocutory appeal and were decided adversely to the contentions of plaintiffs in error. Our decision on that appeal is reported in 25 Haw. 108, and so fully states the facts and the law applicable thereto as to render it unnecessary for us to discuss them here.

The decree of the Circuit Judge is in conformity with that decision and must therefore be affirmed, and it is so ordered.

(Signed S. B. KEMP.

(Signed) W. S. EDINGS.

(Signed) J. T. DeBOLT.

A. WITHINGTON (ROBERTSON, CASTLE & OLSON on the brief), for plaintiffs in error.

R. B. ANDERSON (FREAR, PROSSER, ANDERSON & MARX, on the brief), for H. K. L. CASTLE, one of the defendants in error.

H. IRWIN, Attorney General, filed a brief for the Territory but did not argue.

[Endorsed]: No. 1332. Supreme Court, Territory of Hawaii. October Term, 1920. In the Matter of the Assessment of Inheritance Tax on the Estate of James Bicknell Castle, Deceased. Opinion. Filed October 1, 1921, at 9:40 A. M. J. A. Thompson, Clerk. [52]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1921.

No. 1332.

WRIT OF ERROR TO THE CIRCUIT COURT,
FIRST JUDICIAL CIRCUIT.

Hon. J. J. BANKS, Judge.

In the Matter of the Assessment of Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

Decree.

IT IS HEREBY ORDERED AND DECREED pursuant to the opinion of the above-entitled Court rendered and filed in the above-entitled matter on the 1st day of October, A. D. 1921, that the Decree of the Circuit Court in the above-entitled matter made, entered and filed on the 20th day of April, A. D. 1921, ordering the executors and trustees under the Will and of the Estate of James Bicknell Castle, deceased, to pay to the Treasurer of the Territory of Hawaii, the sum of Nineteen Thousand Six Hundred Fifty-five and 86/100 Dol-

lars (\$19,655.86), being the amount of inheritance tax upon the value of the estate transferred to said trustees by the will of the said decedent, and also ordering said executors and trustees to pay to said treasurer interest upon said sum at the rate of seven per cent (7%) per annum from and after October 8, 1919, be and the same hereby is affirmed.

Dated at Honolulu, T. H. this 5th day of October, A. D. 1921.

By the Court:

[Seal] (Signed) J. A. THOMPSON,
Clerk Supreme Court.

Approved as to form.

(Signed) ROBERTSON, CASTLE & OL-
SON,

Attys. for Ex. and Trustees Will of James B. Cas-
tle.

(Signed) HARRY IRWIN,
Atty. General.

O. K.—(Signed) KEMP.

[Endorsed]: No. 1331. Supreme Court, Terri-
tory of Hawaii. October Term, 1921. In the Mat-
ter of the Assessment of Inheritance Tax on the
Estate of James Bicknell Castle, Deceased. De-
cree. Filed October 5, 1921, at 9:20 A. M. J. A.
Thompson, Clerk. Frear, Prosser, Anderson &
Marx, 507 Stangenwald Building, Honolulu, At-
torney for H. K. L. Castle. [53]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Assessment of an Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

WILLIAM R. CASTLE, LORRIN A. THURSTON
and ALFRED L. CASTLE, Trustees Under
the Will of JAMES BICKNELL CASTLE,
Plaintiffs in Error,

vs.

H. K. L. CASTLE and TERRITORY OF HA-
WAI,II,

Defendants in Error.

**Petition for Writ of Error for the United States
Circuit Court of Appeals for the Ninth Cir-
cuit, to the Supreme Court of the Territory
of Hawaii.**

To the Honorable Chief Justice and Associate Jus-
tices of the Supreme Court of the Territory
of Hawaii.

William R. Castle, Lorrin A. Thurston and Al-
fred L. Castle, Trustees under the Will of James
B. Castle, petitioners in the above-entitled cause,
feeling themselves aggrieved by the decision and
decree in said cause affirming the decree of the
Circuit Court of the First Judicial Circuit of the
Territory of Hawaii which decree of the Supreme
Court of the Territory of Hawaii was entered on
the 5th day of October, A. D. 1921, and complaining

say that there are manifest errors to the damage of the petitioners in the same, which errors are specifically set forth in assignments of error filed herein, to which reference is hereby made; that the amount involved in said [54] suit exclusive of costs exceeds the sum or value of Five Thousand Dollars (\$5,000.00) and that it is a proper case to be reviewed by said Circuit Court of Appeals.

AND WHEREFORE your petitioners would respectfully pray that a writ of error be allowed to them in the above-entitled cause and that they be allowed to prosecute the same to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; that an order be made fixing the amount of security the petitioners shall give and furnish upon said writ of error and upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit; that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record, proceedings and papers in this cause duly authenticated for the correction of the errors so complained of and that a citation and supersedeas may issue.

And your petitioners will ever pray.

Dated, Honolulu, T. H., December 12, 1921.

(Signed) WILLIAM R. CASTLE,

(Signed) ALFRED L. CASTLE,

(Signed) L. A. THURSTON,

Trustees Under the Will of James Bicknell Castle.

Subscribed and sworn to before me this 22d day of December, 1921.

[Seal] (Signed) CHAS. Y. AWANA,

Notary Public First Judicial Circuit, Territory of Hawaii.

(Signed) ROBERTSON, CASTLE & OLSON,

Attorneys for Petitioners. [55]

The foregoing petition is granted, a writ of error allowed, and the amount of bond on said writ of error is fixed at \$25000.00.

Dated, December 27th, 1921.

[Seal] (Signed) S. B. KEMP,

Justice.

[Endorsed]: No. 1332. Supreme Court, Territory of Hawaii. In the Matter of the Assessment of an Inheritance Tax on the Estate of James Bicknell Castle, Deceased. W. R. Castle, et al., Petitioners, vs. H. K. L. Castle and Territory of Hawaii, Respondents. Petition for Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the Territory of Hawaii. Filed December 27, 1921, at 11:15 A. M. J. A. Thompson, Clerk. Robertson, Castle & Olson, Attorneys for Petitioners. [56]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Assessment of an Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

WILLIAM R. CASTLE, LORRIN A. THURSTON
and ALFRED L. CASTLE, Trustees Under
the Will of JAMES BICKNELL CASTLE,
Plaintiffs in Error,

vs.

H. K. L. CASTLE and TERRITORY OF HA-
WAI,II,

Defendants in Error.

Assignments of Error (Original).

Now come the above-named plaintiffs in error, William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, and say in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

1. That the Court erred in affirming the decree in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, dated April 20, 1921, and ordering the payment of a tax in the sum of \$19,655.86 by the Executors of the Estate of James Bicknell Castle as a transfer tax under the succession tax laws of the Territory of Hawaii.
2. That the Court erred in affirming the taxing

of that portion of the estate of James Bicknell Castle which was transferred to the Trustees for charity and for educational purposes, such a gift being exempt from succession tax by the laws of the Territory of Hawaii. [57]

3. That the Court erred in affirming the exemption from a succession tax of an annuity to a son of James Bicknell Castle of an admitted value of \$183,165.53.

4. That the Court erred in affirming a tax on the property of the estate and not upon the right of succession of those taking under the will of James Bicknell Castle.

5. That the Court erred in holding that no property passed by the will of James Bicknell Castle to his son Harold K. L. Castle.

6. That the Court erred in holding that in order to exempt charitable gifts from a succession tax all the estate of the testator must be given wholly to the charitable object.

7. The Court erred in holding that a tax in the sum of \$19,655.86 was correctly levied when the admitted value of the legacies passing to the different legatees called at the most for a tax of \$12,320.06.

8. That the Court erred in holding that the entire tax should be taxed at a uniform rate as part of it passed to a son and part to trustees for charity.

9. That the Court erred in holding that all

questions raised on the writ of error had been decided on the former appeal.

Dated, Honolulu, T. H., December 12, 1921.

ROBERTSON, CASTLE & OLSON,
Attorneys for Plaintiffs in Error. [58]

[Endorsed]: No. 1332. Supreme Court, Territory of Hawaii. In the Matter of the Assessment of an Inheritance Tax on the Estate of James Bicknell Castle, Deceased, William R. Castle et al., Petitioners, vs. H. K. L. Castle and Territory of Hawaii, Respondents. Assignments of Error. Filed December 27, 1921, at 11:15 A. M. J. A. Thompson, Clerk. Robertson, Castle & Olson, Attorneys for Petitioner. [59]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Assessment of an Inheritance Tax on the Estate of JAMES BICKNELL CASTLE, Deceased.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees
Under the Will of JAMES BICKNELL CASTLE,

Plaintiffs in Error,

vs.

H. K. L. CASTLE and TERRITORY OF HAWAII,

Defendants in Error.

Bond on Writ of Error (Original).

KNOW ALL MEN BY THESE PRESENTS: That William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, as principals, and the Trustees of the Oahu College, a corporation, and Albert N. Campbell, as sureties, are held and firmly bound unto Harold K. L. Castle and the Territory of Hawaii in the penal sum of Twenty-five Thousand Dollars (\$25,000), for the payment of which, well and truly to be made to the said Harold K. L. Castle and Territory of Hawaii, do bind themselves and their respective successors firmly by these presents.

THE CONDITION of the above obligation is that whereas on the 27th day of December, 1921, the above bounden principals sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from that certain decree made and entered in the above-entitled court and cause on the 5th day of October, 1921, by the Supreme Court of the Territory of Hawaii; [60]

NOW, THEREFORE, if said principals shall prosecute their said writ of error to effect and answer all damages and costs if they fail to sustain their writ of error, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF the said William R. Castle, Lorrin A. Thurston and Alfred L. Cas.

tle, Trustees under the Will of James Bicknell Castle, as principals, and said Trustees of the Aohu College and said Albert N. Campbell, as sureties, have hereunto set their hands this 27th day of December, 1921.

(Signed) WILLIAM R. CASTLE,

(Signed) ALFRED L. CASTLE,

(Signed) L. A. THURSTON,

Trustees Under the Will of James Bicknell Castle.

THE TRUSTEES OF THE OAHU COL-
LEGE,

By (Signed) C. C. COOKE,

Treasurer (Seal).

(Signed) A. N. CAMPBELL.

The foregoing bond is approved.

[Seal]

(Signed) S. B. KEMP,

Justice of the Supreme Court of the Territory of
Hawaii.

[Endorsed]: No. 1332. Supreme Court, Territory of Hawaii. In the Matter of the Assessment of an Inheritance Tax on the Estate of James Bicknell Castle, Deceased. William R. Castle et als., Petitioners, vs. H. K. L. Castle and Territory of Hawaii, Respondents. Bond on Writ of Error. Filed December 27, 1921, at 11:45 A. M. J. A. Thompson, Clerk. Robertson, Castle & Olson, 125 Merchant St., Honolulu. [61]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Assessment of an Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees
under the Will of JAMES BICKNELL
CASTLE,

Plaintiffs in Error,

vs.

H. K. L. CASTLE and TERRITORY OF
HAWAII,

Defendants in Error.

Praeipie for Transcript of Record on Writ of Error.

To James A. Thompson, Esq., Clerk Supreme
Court, Territory of Hawaii:

You will please prepare a transcript of record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and include in said transcript the following pleadings, opinions, decrees and papers on file in said cause, to wit:

1. Stipulation between parties, dated April 4, 1921, and attached thereto as exhibits thereof, are the following, viz: Exhibit "A," printed copy of the Last Will and Testament of James Bicknell Castle, dated September 13, 1907, and Codicil thereto, dated August 19, 1912, and Exhibit "B,"

copy of a statement of the value of the Estate of James Bicknell Castle, filed April 9, 1921. [62]

2. Copy of motion by the Territory of Hawaii for order assessing and fixing value of devises and bequests and the amount of tax to which the same are liable, dated April 9, 1921.

3. Copy of the answer of respondent Harold K. L. Castle to the motion of the Territory of Hawaii for order assessing and fixing value of devises and bequests and the amount of tax to which the same are liable, dated and filed April 12, 1921.

4. Copy of the answer of the Executors and Trustees under the Will of James Bicknell Castle to the motion for an order assessing and fixing the value of devises and bequests and the amount of tax to which the same are liable, dated and filed April 12, 1921.

5. Copy of the Minutes of the Clerk of the Third Division of the Circuit Court of the First Circuit under dates, to wit, April 12, and 20, 1921.

6. Copy of decree of the Circuit Court, First Circuit, directing payment of tax, dated and filed April 20, 1921.

7. Copy of the decision of Hon. James J. Banks on the motion of the Territory of Hawaii for order assessing and fixing the value of devises and bequests and the amount of tax to which the same are liable, dated April 22, 1921.

8. Copy of the opinion of the Supreme Court of the Territory of Hawaii, rendered and filed September 6, 1919, in the cases respectively entitled as follows: (1) "In the Matter of the

Estate of James Bicknell Castle, Deceased," Numbered 1179, and (2) "In the Matter of the Assessment of the Inheritance Tax on the Estate of James Bicknell Castle, Deceased," Numbered 1186 (Reported in Volume 25 Hawaii Reports, pp. 108-120).

9. Copy of application for writ of error to the Circuit Judge of the First Circuit, Territory of Hawaii, dated and filed May 16, 1921.

10. Copy of assignments of error and notice of application for writ of error, dated and filed May 16, 1921.

11. Copy of bond on writ of error for \$20,000.00; William R. Castle and Harold K. L. Castle, Executors under the Will of James Bicknell Castle, Deceased, and William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, Deceased, Principals; A. N. Campbell and F. E. Steere, Sureties, and the Territory of Hawaii and Harold K. L. Castle, as Obligees, dated May 13, 1921. [63]

12. Copy of Writ of Error, dated May 16, 1921, with return noted at the end thereof.

13. Copy of the Opinion of the Supreme Court of the Territory of Hawaii, rendered and filed in the above-entitled cause on the first day of October, 1921. (Reported in Volume 26, Hawaii Reports, pp.—).

14. Copy of the Decree of the Supreme Court of the Territory of Hawaii, filed October 5, 1921.

Dated, Honolulu, T. H., December 27, 1921.

(Signed) ROBERTSON, CASTLE & OLSON,
Attorneys for Plaintiffs in Error.

[Endorsed]: No. 1332. Supreme Court, Territory of Hawaii. In the Matter of the Assessment of an Inheritance Tax on the Estate of James Bicknell Castle, Deceased, William R. Castle, et al., Petitioners. v. H. K. L. Castle and Territory of Hawaii, Respondents. Praecipe of Transcript of Record on Writ of Error. Filed December 27, 1921, at 11:15 A. M. J. A. Thompson, Clerk. Robertson, Castle & Olson, Attorneys for Plaintiffs in Error. [64]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Assessment of an Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees
Under the Will of JAMES BICKNELL
CASTLE,

Plaintiffs in Error,

vs.

H. K. L. CASTLE and TERRITORY OF
HAWAII,

Defendants in Error.

Writ of Error (Original).

United States of America,—ss.

The President of the United States of America to
the Honorable, the Judges of the Supreme
Court of the Territory of Hawaii, GREET-
ING:

Because in the record and in the proceedings, as

also in the rendition of judgment in said Supreme Court of the Territory of Hawaii before you, in the case of "In the Matter of the Assessment of an Inheritance Tax on the Estate of James Bicknell Castle, Deceased, No. 1332," a manifest error has happened to the great prejudice and damage of William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, petitioners, as is said and appears by the petition herein,—

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you [65] send the record and proceedings aforesaid with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said Circuit Court thirty days after this date, and the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein, to correct those errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 27th day of December, A. D. 1921.

ATTEST my hand and the seal of the Supreme Court of the Territory of Hawaii, at the clerk's office, Honolulu, Territory of Hawaii, on the day and year last above whitten.

[Seal]

J. A. THOMPSON,

Clerk of Supreme Court, Territory of Hawaii.

Allowed this 27th day of December, A. D. 1921.

[Seal]

S. B. KEMP,

Associate Justice of the Supreme Court of the Territory of Hawaii. [66]

[Endorsed]: No. 1332. In the Supreme Court of the Territory of Hawaii. In the Matter of the Assessment of an Inheritance Tax on the Estate of James Bicknell Castle, Deceased. William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, Plaintiffs in Error, vs. H. K. L. Castle and Territory of Hawaii, Defendants in Error. Writ of Error. Filed December 27, 1921 at 3:20 P. M. and Issued for service. J. A. Thompson, Clerk. Returned December 28, 1921, at 9:15 A. M. J. A. Thompson, Clerk. [67]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Assessment of an Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees
Under the Will of JAMES BICKNELL
CASTLE,

Plaintiffs in Error,

vs.

H. K. L. CASTLE and TERRITORY OF
HAWAII,

Defendants in Error.

Citation on Writ of Error (Original).

United States of America,—ss.

The President of the United States of America to
Harold K. L. Castle and the Territory of
Hawaii, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, are plaintiffs in error, and you are defendants in error, to show cause, if any there

may be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.
[68]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 27th day of December, A. D. 1921.

Honolulu, December 27th, 1921.

[Seal]

S. B. KEMP,
Justice of the Supreme Court Territory of Hawaii.

Service of the within citation is hereby admitted this 27th day of December, 1921.

TERRITORY OF HAWAII.

By HARRY IRWIN,
Attorney General.

H. K. L. CASTLE,
Defendant in Error.

By FREAR, PROSSER, ANDERSON &
MARX,

His Attorneys.

ROBBINS B. ANDERSON,
Of Counsel. [69]

[Endorsed]: No. 1332. In the Supreme Court of the Territory of Hawaii. In the Matter of the Assessment of an Inheritance Tax on the Estate of James Bicknell Castle, Deceased. William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees Under the Will of James Bicknell Castle, Plaintiffs in Error, vs. H. K. L. Castle and Territory of Hawaii, Defendants in Error.

Citation on Writ of Error. Filed December 27, 1921 at 3:20 P. M. and Issued for Service. J. A. Thompson, Clerk. Returned December 28, 1921, at 9:15 A. M. J. A. Thompson, Clerk. [70]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1921.

No. 1332.

In the Matter of the Assessment of an Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

**Order Extending Time to and Including February
28, 1922, for Preparation and Transmission of
Record (Copy).**

Upon the applications of William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, plaintiffs in error, and good cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS THEREFORE ORDERED that the said William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, plaintiffs in error, and the Clerk of this Court be, and they are hereby allowed until and including the 28th day of February, 1922, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit

at San Francisco, California, the record in the above-entitled cause on assignments of error and all other papers required as part of said record.

Dated at Honolulu, T. H., this 16th day of January, 1922.

[Seal].

JAMES L. COKE,

Chief Justice of the Supreme Court of the Territory of Hawaii. [71]

[Endorsed]: No. 1332. Supreme Court, Territory of Hawaii. In the Matter of the Assessment of an Inheritance Tax on the Estate of James Bicknell Castle, Deceased. Order Extending Time for Preparation and Transmission of Record. Filed January 16, 1922, at 10:40 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [72]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1921.

No. 1332.

In the Matter of the Assessment of an Inheritance Tax on the Estate of JAMES BICKNELL CASTLE, Deceased.

Certificate of Clerk of Supreme Court to Transcript of Record and Return to Writ of Error.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within writ of error, the original whereof is herewith returned, being pages 65 to 67, both in-

clusive of the foregoing transcript, and in pursuance to the praecipe to me directed, a copy whereof is hereto attached, being pages 62 to 64, both inclusive of the foregoing transcript,—

DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 30, both inclusive, pages 44 to 56, both inclusive, and pages 60 to 61, both inclusive, and I certify the same to be full, true and correct copies of the pleadings, records, entries and final decree which are now on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in a cause entitled in said Court, “In the Matter of the Assessment of an Inheritance Tax on the Estate of James Bicknell Castle, Deceased,” Numbered 1332.

I FURTHER CERTIFY that pages 31 to 43, both inclusive, of the foregoing transcript of record, is a full true and correct copy of the opinion of the Supreme Court of the Territory of Hawaii, rendered and filed on the 6th day of September, 1919, in the cases respectively entitled as follows: (1) “In the Matter of the Estate [73] of James Bicknell Castle, Deceased,” Numbered 1179, and (2) “In the Matter of the Assessment of the Inheritance Tax on the Estate of James Bicknell Castle, Deceased,” Numbered 1186.

I DO FURTHER CERTIFY that the original assignments of error, being pages 57 to 59, both inclusive, the original citation on writ of error, with acknowledgment of service thereof, being pages 68

to 70, both inclusive, and the original order for extension of time for preparation and transmission of record, filed January 16, 1922, being pages 71 to 72 of the foregoing transcript of record, are hereto attached and herewith returned.

I LASTLY CERTIFY that the cost of the foregoing transcript of record is \$39.50, and the said amount has been paid by Messrs. Robertson, Castle & Olson, attorneys for the plaintiffs in error.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 26th day of January, A. D. 1922.

[Seal] JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of
Hawaii. [74]

[Endorsed]: No. 3833. United States Circuit Court of Appeals for the Ninth Circuit. William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees Under the Will of James Bicknell Castle, Plaintiffs in Error, vs. Harold K. L. Castle and The Territory of Hawaii, Defendants in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed February 8, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By PAUL P. O'BRIEN,
By Paul P. O'Brien,

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1921.

No. 1332.

In the Matter of the Assessment of an Inheritance
Tax on the Estate of JAMES BICKNELL
CASTLE, Deceased.

**Order Extending Time to and Including February
28, 1922, for Preparation and Transmission of
Record (Original).**

Upon the applications of William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, plaintiffs in error, and good cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS THEREFORE ORDERED that the said William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, plaintiffs in error, and the Clerk of this Court be, and they are hereby allowed until and including the 28th day of February, 1922, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the record in the above-entitled cause on assignments of error and all other papers required as part of said record.

Dated at Honolulu, T. H., this 16th day of January, 1922.

[Seal] (Signed) JAMES L. COKE,
Chief Justice of the Supreme Court of the Territory of Hawaii. [76]

CERTIFICATE.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing document and attached hereto, is a full, true and correct copy of the original thereof, which is now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in the foregoing entitled cause, Numbered 1332.

WITNESS my hand and the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, this 16th day of January, A. D. 1922.

[Seal] JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii. [77]

[Endorsed]: No. 1332. Supreme Court, Territory of Hawaii. In the Matter of the Assessment of an Inheritance Tax on the Estate of James Bicknell Castle, Deceased. Order Extending Time for Preparation and Transmission of Record. Filed January 16, 1922, at 10:40 A. M. (Signed) J. A. Thompson, Clerk Supreme Court of Hawaii.

No. 3833. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including February 28, 1922, to File Record and Docket Cause. Filed Jan. 25, 1922. F. D. Monckton, Clerk. Refiled Feb. 8, 1922. F. D. Monckton, Clerk.

No. 3833

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

WILLIAM R. CASTLE, LORRIN A.
THURSTON, and ALFRED L.
CASTLE, Trustees under the Will
of JAMES BICKNELL CASTLE,

Plaintiffs-in-Error,

vs.

HAROLD K. L. CASTLE and the
TERRITORY OF HAWAII,

Defendants-in-Error.

No. 3833.
In Error to
the
Supreme
Court
of Hawaii.

BRIEF OF THE PLAINTIFFS IN ERROR

*Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.*

A. G. M. ROBERTSON,
ALFRED L. CASTLE,
W. A. GREENWELL,
ARTHUR WITHINGTON,
Attorneys for Plaintiffs-in-Error.

Filed this.....day of.....,
1922.

F. D. MONCKTON, Clerk,

By.....Deputy Clerk.

FILED

APR 10 1922

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No. 3833

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WILLIAM R. CASTLE, LORRIN A.
THURSTON, and ALFRED L.
CASTLE, Trustees under the Will
of JAMES BICKNELL CASTLE,
Plaintiffs-in-Error,

vs.

HAROLD K. L. CASTLE and the
TERRITORY OF HAWAII,
Defendants-in-Error.

BRIEF OF THE PLAINTIFFS IN ERROR

*Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.*

This is an appeal from a judgment affirming an order fixing and determining a territorial succession tax of \$19,655.86 with interest at 7% from October 8, 1918, on property passing by the will of James Bicknell Castle. (Record, p. 62.) The will created a trust on which was charged an annuity to a son of the testator, valued at \$183,165.53 by the stipulation (the other annuities in the will are eliminated by rejection or death) and all surplus income to accumulate during and with the remainder at the expiration of said annuity to be devoted to an edu-

cational charity. The net estate was valued at \$317,244.11 and by the stipulation the remainder at \$134,078.68. (Record, p. 3.) The tax of \$19,655.86 was not fixed by determining who the beneficiaries were, their relations to the testator, or the value of their legacies, but was levied on the executors and trustees on the net valuation of the estate as though there were one gift to a stranger. The court refused to exempt the charitable gift from a tax as provided by the territorial statute or to assess the annuity at its agreed valuation on the lesser rate provided by the territorial statute of 3 per cent. with an exemption of \$5,000 when there is a gift to a son; but assessed it at the rate of $6\frac{1}{2}\%$. It is agreed that the tax on the son's gift would be \$4,569.96 were he the successor and if the value of his gift to be deducted from the net estate the value of the remainder is \$134,078.68 on which there would be a tax of \$7,750.10 if taxable at all. (Record, p. 3.)

The material parts of statutes of the Territory of Hawaii in force on April 8, 1918, when the testator died, are as follows:

Act 223, Session Laws, Territory of Hawaii, 1917, amends Section 1325 of Chapter 95, R. L. of Hawaii, 1915, by providing that, "All property which shall pass by will * * * to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or persons, or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, shall be and is subject to a tax * * *

“When the beneficial interest to any property or income therefrom shall pass to or for the use of his * * * child * * * the rate of the tax shall be * * * in excess of five thousand dollars * * * 3 per cent. on amounts between \$100,000 and \$250,000 * * *”

“When property passes as provided herein in trust or otherwise and the rights, interests or estates of the donee are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed * * * and such tax shall be due and payable forthwith by the executors or trustees *out of the property transferred.*”

Section 1324 of R. L., Territory of Hawaii, 1915, provides, “All property transferred to * * * any person, society, corporation, institutions or associations of persons in trust for or to be devoted to any charitable, benevolent, educational or public purpose, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy to any such property, shall be exempt from this tax.”

Section 1325, R. L., Territory of Hawaii, 1915, provides that, “When any grant, gift, legacy or succession upon which a tax is imposed by Section 1323 shall be an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, and the market value thereof determined in the manner provided in Section 1334 and the tax * * * shall be immediately due and payable * * * provided that the person, persons, or body politic or corporate, beneficially interested in the property chargeable with said tax may elect not to pay the same until they shall come into the actual possession

or enjoyment of such property," and on such election shall give a bond for its payment.

Section 1329 provides that "Any administrator, executor or trustee having in charge or trust any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom * * * if, however, such legacy be given in money to any person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount; but if it be not in money he shall make application to the circuit judge, having jurisdiction, to make an apportionment, if the case require, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require."

Section 1334 of R. L., Territory of Hawaii, 1915, provides that, "When the value of any inheritance, devise, bequest, or other interest subject to the payment of said tax is uncertain, the circuit judge before whom the probate proceedings are pending, on the application of any interested party, or upon his own motion, may appoint some competent person or persons as appraisers, as often as and whenever occasion may require, whose duty it shall be forthwith to give notice, by mail, to all persons known to have, or to claim an interest in such property, to the Treasurer of the Territory and to such persons as the circuit judge may by order direct, of the time and place at which he will appraise such property, and at such time and place to appraise the same and make a report thereof, in writing, to said circuit judge, together with such other facts in relation thereto as said circuit judge may by order require to be filed with the clerk of said court; and from this report, or in case appraisers are not appointed, in any event, the said circuit judge shall, by order assess and fix the value of all inheritances, devises, bequests, or other interests, and the tax to which the same is liable, and shall immediately cause notice thereof to be given by mail, to all persons known to

be interested therein. The value of every future or contingent or limited estate, income or interest shall, for the purpose of this chapter, be determined by the insurance commissioner, by the rule, method and the standards of mortality and of value that are set forth in the American Experience tables of mortality for ascertaining the value of policies of life insurance and annuities and for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per centum per annum, and said commissioner shall certify such value to the appraisers or judge as the case may be."

Act 223, Session Laws of Hawaii, 1917, is as follows:

SECTION 1. Section 1323 of chapter 95 of the Revised Laws of Hawaii, 1915, is hereby amended to read as follows:

"Section 1323. Imposed when, rate. All property which shall pass by will or by the intestate laws of this Territory, from any person who may die seized or possessed of the same while a resident of this Territory, or which, being within this Territory, shall pass, whether by the laws of this Territory or otherwise, from any person who may so die while not a resident of this Territory, or which or any interest in or income from which, shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor, vendor, or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, shall be and is subject to a tax hereinafter provided for, to be paid to the treasurer of the Territory of Hawaii as hereinafter directed, for the use of the

Territory; and such tax shall be and remain a lien upon the property passed or transferred until paid, and all administrators, executors, and trustees of every estate so transferred and the person to whom the property passes or is transferred or passed shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemption hereinafter granted.

Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after April 28, 1909, such appointment when made, shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this chapter shall be deemed to take place to the extent of such omissions or failures in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

When the beneficial interest to any property or income therefrom shall so pass to or for the use of his or her father, mother, husband, wife, child, grandchild, or any child adopted as such in conformity with the laws of the Territory of Hawaii, the rate of the tax shall be at the following percentage rate of the market value of such property, received by each person, except aliens and non-resi-

dents of the United States, in excess of five thousand dollars, viz:

1½ per cent. on amounts between \$5,000 and \$20,000.

2 per cent. on amounts between \$20,000 and \$50,000.

2½ per cent. on amounts between \$50,000 and \$100,000.

3 per cent. on amounts between \$100,000 and \$250,000.

3½ per cent. on amounts over \$250,000.

In all other cases, except aliens and non-residents of the United States, the rate of tax of the market value of such property in excess of five hundred dollars shall be as follows, viz:

3 per cent. on amounts between \$500 and \$5,000.

5 per cent. on amounts between \$5,000 and \$20,000.

5½ per cent. on amounts between \$20,000 and \$50,000.

6 per cent. on amounts between \$50,000 and \$100,000.

6½ per cent. on amounts over \$100,000.

When the beneficial interest to any property or income therefrom shall so pass to an alien or non-resident of the United States, the rate of tax shall be 10 per cent. of the market value of such property received by each person, in excess of five hundred dollars (\$500). All property so passing for which such exemption of five thousand dollars (\$5,000) can be maintained shall not be taxable as income under the provisions of any other law.

When property passes as provided herein in trust or otherwise, and the rights, interest or estates of the donees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of

this Act, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred."

SECTION 2. This Act shall take effect on July 1, A. D. 1917.

The assignments of error are as follows:

1. The court erred in affirming the decree in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, dated April 20, 1921, and ordering the payment of a tax in the sum of \$19,655.86 by the Executors of the Estate of James Bicknell Castle as a transfer tax under the succession tax laws of the Territory of Hawaii;

2. That the court erred in affirming the taxing of that portion of the estate of James Bicknell Castle which was transferred to the trustees for charity and for educational purposes, such a gift being exempt from succession tax by the laws of the Territory of Hawaii;

3. That the court erred in affirming the exemption from a succession tax of an annuity to a son of James Bicknell Castle of an admitted value of \$183,165.53;

4. That the court erred in affirming a tax on the property of the estate and not upon the right of succession of those taking under the will of James Bicknell Castle;

5. That the court erred in holding that no property passed by the will of James Bicknell Castle to his son, Harold K. L. Castle;

6. That the court erred in holding that in order to exempt charitable gifts from a succession tax all the estate of the testator must be given wholly to the charitable object.

7. That the court erred in holding that a tax in the sum of \$19,655.86 was correctly levied when the admitted value of the legacies passing to the different legatees called at the most for a tax of \$12,320.06;

8. That the court erred in holding that the entire tax should be taxed at a uniform rate as part of it passed to a son and part to trustees for charity;

9. That the court erred in holding that all questions raised on the writ of error had been decided on the former appeal.

ARGUMENT.

THE HAWAIIAN TAX IS ONE OF SUCCESSION.

It is too well established for argument that an inheritance tax such as this in the Territory of Hawaii is not a tax upon property but an excise tax upon the right to succeed to property.

Maxwell v. Bugbee, 250 U. S. 538.

Magoun v. Ill. Trust & Savings Bank, 170 U. S. 283.

Estate of Dillingham, 25 Haw. 129.

THE PERSON WHO SUCCEEDS TO PROPERTY IS THE ONE WHO GETS THE BENEFICIAL INTEREST.

The Hawaiian statutes plainly state this and all decisions of similar statutes from which the Hawaiian statute was drawn have so held.

The earliest case is *Sohier v. Eldridge*, 103 Mass. 345, in which the U. S. St. 1864, c. 173, inheritance tax law was construed. It was there contended that because there was a gift to trustees they were the successors, but the court held otherwise and said the tax was the same whether there was a gift directly to a person or to a trustee for that person's benefit.

U. S. v. Tappan, 16, 431, Fed. Cas., Choate, J., says of this same contention, "It is clear from all these provisions that the 'successor' is the party beneficially interested in real estate * * * There is nothing whatever, not a single expression in the act going to show that an executor or trustee, holding the title for such person so beneficially interested, or empowered to collect the rents and profits for such person is to be regarded as the 'successor'."

State v. Hale, 100 Minn. 192, 110 N. W. 865, in construing the Minnesota law, the court reversed an order levying a tax on the trustees as successors to the property when they held for certain life interests and contingent remainder.

In re Tracy, 179 N. Y. 501, the exact language of the Hawaiian statutes are construed and these words of Judge Haight are approved: "The tax is not required to be paid by the conditional transferee, but by the provision of the statute, it is 'to be paid out of the property transferred,' so that whoever may ultimately take the property takes that which remains after payment of the tax."

Re Est. Kennedy (Cal.) 29, L. R. A. (N. S.) 428.

Re State, 132 Iowa 140, "The collateral inheritance tax law is on the right of succession of property * * * and is collectable out of each specific share or interest, not out of the general property of the estate."

"If an estate in remainder is appraised simultaneously with an annuity or life interest its value is determined by deducting from the entire estate the value of the annuity or life estate." There was a gift to trustees, *Milton v. Burrill*, 229 Mass. 140, 118 N. E. 274.

Minot v. Winthrop, 162 Mass. 113-126, "The statute contemplated that the tax should be paid out of the annuity as soon as the annuity becomes payable and at the time when payments on account of the annuity are made."

After an extensive search of authorities we are unable to find a single decision of a court of last resort holding that trustees are successors to legacies under tax laws.

THE DECISION OF THE TERRITORIAL SUPREME COURT IS AMBIGUOUS.

The decision of the Supreme Court of the Territory on reserved questions in 25 Haw. 108 says it is not necessary to decide whether the rule against perpetuities is violated, but apparently decides that there is a gift to charity which is good, but which is taxable.

The only theory which is logical for taxing the entire estate in the hands of the trustees would be to hold the charity void, and a resulting trust in favor of the heir. But in that case the heir being a son, the entire estate would go to him and the statute

provides a tax of $3\frac{1}{2}$ per cent. with an exemption of \$5,000 or a tax of \$11,103.37 instead of the present tax of \$19,655.86.

If there is a good gift to charity the statute exempts it and the annuity to the son is the only taxable legacy, and that calls for a tax of \$4,569.96.

There are then three results:

1st. A void trust to charity, a resulting trust in the heir and a tax of \$11,103.37.

2d. A valid trust to charity, taxable, in which case there would be two taxes: one on the annuity of \$4,569.96 and one on the remainder to charity of \$7,750.10, making a total of \$12,320.06.

3d. A valid trust to charity, exempt, with a tax upon the annuity of \$4,569.96.

THE CASE OF *ESTATE OF DILLINGHAM*, 25 HAW. 129, DECIDED AFTER THE DECISION OF THIS CASE WHEN FIRST IN THE SUPREME COURT HOLDS THAT THE BENEFICIARIES PAY THE TAX ON LEGACIES.

Estate of Dillingham, 25 Haw. 129, decided seventeen days after the first decision in this case, the court in passing on the question whether the federal estate tax should be deducted from the gross estate before territorial inheritance taxes are imposed says, 'This then brings us to a consideration of the nature of the federal estate tax because upon that, we think, depends the answer to the question whether or not the amount by way of such tax ever in fact passes to the beneficiaries under the will who are called upon to pay to the Territory a tax upon the property thus passing to them.' The court then decided the federal tax should be deducted. It holds

the federal tax is one on the "power to transmit or the transmission from the dead to the living and is not a tax upon the legacies to be measured by the value of such legacies." In other words, that the federal tax is one on the power of the testator to transmit, while the territorial tax is one on the legatees to receive.

This is exactly the contention of the appellants, that the tax in this case should be based upon the right to succeed and that the language, "passes to the *beneficiaries* under the will who are called upon to pay to the Territory a tax upon the property thus passing to them," describes exactly to appellant's contention.

THE COURT DID NOT PASS UPON THE QUESTION OF THE VALIDITY OF THE AMOUNT OF THE TAX WHICH WAS RAISED BY THE ASSIGNMENT OF ERROR.

The court says in its opinion that the only questions raised by the assignments of error in the Supreme Court were whether the annuity and the remainder were taxable. (Record, p. 61.)

This is not so, as the first assignment of error raises the question whether the tax of \$19,655.86 was erroneous in the following form:

"1. That it was error to render and enter the decree in said cause directing the payment by the plaintiffs-in-error of a tax of \$19,655.86 and interest thereon at 7% from October 8, 1918." (Record, p. 53.)

This raised the question of amount of the tax which was ignored in the decision of the Supreme Court.

There was nothing in the former decision which showed at what rate a tax should be levied. There

was merely a reserved question whether any appraisers should be appointed as no tax might be due.

THERE IS MANIFEST ERROR AND THE RULE OF CONSTRUCTION OF A LOCAL LAW SHOULD NOT BE APPLIED.

If this were a question of construction of a local law it would be binding on a federal court in exercising co-ordinate jurisdiction, but the rule in this court in exercising its appellate jurisdiction is different and it is not bound if there is manifest error.

In *Fox v. Haarstick*, 156 U. S. 674, "It is true that this ruling of the Supreme Court of the Territory does not, even in questions of practice arising under the local law, preclude this court from reviewing it as would a decision of a state court in similar circumstances; but unless a manifest error be disclosed, we should not feel disposed to disturb a decision of the supreme court of a territory construing a local statute."

There is a manifest error in the rate and amount of tax upon the legacies, especially as that question was denied consideration by the Supreme Court.

Moreover, aside from the size of the tax, which is erroneous, the decision is so obscure in view of the words of the court in the case of *Estate of Dillingham, supra*, as to leave it uncertain whether it was arrived at by construing the statute or by holding that the charity was invalid, which is a question of general rather than local law.

This court in this same estate has taken jurisdiction in the construction of a local law, to-wit, the law of dower and descent.

Castle v. Castle, 267 Fed. 521.

There is no question of well settled local law in this case, as this is the first decision under this statute which involves the points at issue. There has never been a decision either in Hawaii or anywhere else holding that the trustees were the successors under the statute and not the beneficiaries.

The case of *Estate of Brown*, 24 Haw. 443, which is said to be affirmed, was decided upon a tax which became due before the amendment quoted *supra* in 1917, wherein it is ordered that the tax on legacies should be paid, "out of the property transferred."

THE CASE OF *ESTATE OF BROWN*, 24 HAW. 443, IS CONTRA TO WELL-SETTLED LAW AND THE HAWAIIAN STATUTE HAS SINCE BEEN CHANGED.

The case of *Estate of Brown*, 24 Haw. 443, decides that an annuity is not property and no interest in property passes to a legatee of an annuity, but all the property on which it is charged passes to the remainderman. In this case as the residuary bequest is to trustees for charity, which the statute exempts, then both legacies are exempt from taxation; the annuity under the decision of *Estate of Brown* *supra*, if it applies, and the remainder under the statute. Of course, if the annuitant has no property in the remainder, then the remainderman takes it all, free from any property claim. But the court decides that two legacies which are exempt separately as to successions are taxable together.

In other words, that nothing and nothing added makes two. This is a *reductio ad absurdum*. The court did not see that the case of *Estate of Brown* supra was both wrong in principle and made innocuous by the statute of 1917.

Mr. Justice Holmes, in the case of *U. S. v. Fidelity Trust Co.*, 222 U. S. 158, punctures this theory of an annuity not being a vested interest in the fund. A legacy of an annuity was given a niece and there was an attempt to recover back a portion of the succession tax under the statute that exempted estates which had not vested prior to July 1, 1902, it being claimed that only that portion which had been paid the niece prior thereto had vested. The court says: "It was a vested interest in a fund * * * objections like those which are made to treating a life estate as a present unity might be made to the similar treatment of absolute ownership in fee. In actual life a fee can be enjoyed only minute by minute, but although eternal in theory of law, by the same theory at every moment it is all and wholly in the owner's hand. The statute does not invite speculation in a new nomenclature or attempt to reach profounder conceptions than those familiar to the law. * * * It deals in terms with the interest, that is, the legal unit of right, not with the money received before a given moment."

Approved in *Kahn v. U. S.*, Advance Sheets U. S. Supreme Court, Jan. 1, 1922.

THE HAWAIIAN STATUTE EXPRESSLY
EXEMPTS GIFTS TO TRUSTEES TO BE DE-
VOTED TO CHARITY.

There does not seem to be any necessity to more than quote the statute of exemption of gifts to trustees for an educational purpose to show that the trustees when so receiving gifts are not liable to a tax. On this issue there is no question as to who are the successors, the trustees or the beneficiaries, as the statute expressly exempts "property transferred * * * to any person * * * or association of persons * * * in trust for or to be devoted to any educational purpose." Nothing could be clearer that the gift in this will to charity is exempt from a succession tax unless the gift is void as violating the rule against perpetuities which the court has expressly held it did not pass upon.

The court by a strained construction of the word devoted in the statute and failing to take into consideration that it is but a part of a phrase "to be devoted" says that because Webster defines that word as meaning "to give up wholly" that therefore a gift to be devoted to charity which has a charge upon it of an annuity is not a giving up wholly and consequently is not exempt. The words of the statute are "for or to be devoted to any charitable, benevolent, educational or public purpose." It would seem that this plainly implies either a present or a future devotion of the gift, meaning that a gift to charity after an intervening life estate is exempt. Appar-

ently the court contends that the words "to be devoted" mean not the devoting of the entire fund to a charity at a future time, but that a testator must devote or give up wholly his entire estate to a charity in order to have it exempt, which on the face is absurd.

To quote Mr. Justice Holmes again in *U. S. v. Fidelity Trust Co.*, supra, "The statute does not invite speculations on a new nomenclature or to reach profounder conceptions than those familiar to the law. * * * It deals in terms with the interest, that is, *the legal unit of right.*"

The case of *Balch v. Shaw*, 174 Mass. 144, is one in which an inheritance law such as the Hawaiian statute was construed, wherein the donor gave a fund to charity, charged with an annuity, and the court held the charitable gift exempt. The Massachusetts statute was not as strong as the Hawaiian in that the exemption clause was "to or for charitable, educational or religious societies or institutions." The interpretation made by the Hawaiian court was evidently not thought worthy of consideration either by the Attorney General who sought to impose a tax or the court which passed on the question. The court held it was for an educational institution although charged with a life estate.

THE CHARITY IS GOOD.

There are two things that must be determined in any case involving the question of the validity of a public charity:

1st. Does it vest in the hands of trustees for the

charitable purpose within the time required by the rule against perpetuities?

2nd. Is there any one who has a private interest as a beneficiary beyond the time defined for the existence of a private trust by the rule against perpetuities?

There is a present vesting by the terms of the will in the hands of trustees for charity, as the gift is immediately to them.

The only beneficiaries under the will are the life estate of H. K. L. Castle, which of course does not violate the rule and the educational purpose. All the other provisions are mere directions as to investments, the profits or losses of which would be borne by the educational charity.

The only private purpose that could by any possibility be implied is where in the expansion of its business the testator provides "to accumulate sufficient land and capital to systematically establish an effort to introduce a high-class agricultural immigration of Northern races, preferably Scandinavian, Anglo-Saxon and Teutonic, then I desire them to expand into such enterprises without hesitation and I hereby empower them amply herein for the purpose." (Record, p. 9.) There is nothing here to show that any money is to be expended except as incidental to the management of the trust property, and in that expansion the charitable trust is the beneficiary, but even if this were to be construed as a power to use the funds for immigration purposes and assisting individuals of the Northern races to emigrate to Ha-

waii, that would have all the elements of a charitable purpose.

When we consider that Hawaii is the meeting ground of the Christian and Oriental civilizations; that the introduction of a Christian immigration is of vital consequence to the spread of Christianity; that it is for the benefit of an indefinite number of people and is not confined to individuals, there is found therein all the elements of Mr. Binney's famous definition:

"Whatever is given for the love of God or for the love of your neighbor in the catholic or universal sense—given from those motives and to those ends, free from the stain or taint of every consideration that is personal, private or selfish."

Nothing has more of a religious object than the spreading of the Christian civilization. This is the motive and the end of this clause. The Oriental labor economically would be more profitable, but the fate of Hawaii as a Christian white colony might depend upon an immigration of Scandinavians, Anglo-Saxons and Teutons.

But it is not necessary to decide this question, as the language of the will indicates merely that the immigration shall be induced as the mere incident of the development and expansion in business of the trustees.

In *Burbank v. Whitney*, 24 Pick. 146, it was decided a gift to the American Colonization Society, whose purpose was the colonizing with their own

consent on the coast of Africa the people of color residing in America was held a good charity.

Moreover, there are English cases which hold that a general gift to the increase and encouragement of good servants is a good charity.

Loscombe v. Winteringham, 13 Beavan 87.

Reeve. v. Atty. Gen., 3 Haw. 991.

Miller v. Rowan, 5 Cl. 2 Fin. 99.

The question of vesting is settled by the case of *Lunalilo Trustees v. Haalilio*, 8 Haw. 640, in which there was a gift to three trustees to be nominated by the Supreme Court, who were to sell the real estate and hold till it accumulated amount to \$25,000; then to purchase land and build home for destitute and infirm Hawaiians. Held no resulting trust in heirs. Here was the same gift to trustees for a charitable purpose and the holding the property for an accumulation.

In this case there is no such question as has been disturbing the New York courts for years, and which was finally remedied by statute in 1893, a gift to trustees to turn over to a corporation not in existence, but the trustees are themselves the managing and holding trustees for the charity.

Even in the New York exception the English and the great majority of American decisions are that there is a present vesting.

Gray on Perpetuities, Sec. 607.

Inglis v. Sailors Snug Harbor, 3 Pet. 99.

Ould v. Washington Hospital, 95 U. S. 303.

Russell v. Allen, 107 U. S. 163.

Codman v. Brigham, 187 Mass. 309.

This last will was construed by the federal court in *Brigham v. Hospital*, 134 Fed. 513. The leading English case is *Chamberlayne v. Brockett*, 5 L. R., Ch. 206.

POWERS MAY BE VOID, BUT THEREBY DO NOT INVALIDATE THE CHARITY IF THERE IS A PRESENT VESTING FOR CHARITY.

The only reason there is any semblance of doubt as to the validity of this charitable trust is because the testator has given his trustees powers of business management which are not within the ordinary powers of trustees in the investment of charitable funds.

But void powers of management do not in any way invalidate a charity otherwise good.

Odell v. Odell, 10 Allen 1: "The reasons are much stronger for not allowing illegal directions for accumulations or management of a fund devoted to charitable purposes, to defeat the gift, and for carrying out the scheme of the testator as far as the law will allow, if it cannot be followed to its full extent," and cases cited.

Perry on Trusts, Sec. 738.

The testator provides that all excess income shall accumulate during the life estate for the educational purpose. The charity is the beneficiary of all surplus income. Because it is invested in certain com-

mercial enterprises evidently dear to the heart of the testator does not in any way impair the character of the charitable gift.

A testator might give his entire estate to trustees for charity and provide that they might use the capital to speculate on margin in the stock market. The gift to charity would be good, the power would be void and its exercise restrained by a court of equity.

Nourse v. Merriam, 8 Cush. 11, where a gift was made for education in a certain town and eight persons, named, and their descendants were excluded from the benefits of gift. The charity was held good and the direction or limitation void as against public policy.

Russell v. Allen, 107 U. S. 163, says:

“The testator’s directions as to management of the income must be regarded as subsidiary to the general objects of his will, and whether legal and practicable or otherwise, can exert no influence over its validity.”

Tincher v. Arnold, 147 Fed. 665, 7 L. R. A. (N. S.) 476:

“Assuming that the whole scheme of management should fail the charitable use will not be permitted to fail. *In re Daly’s Estate*, 206 Pa. 58.”

Perry on Trusts, Sec. 738:

“But if an estate given to trustees for charity is once vested in them for a lawful purpose, all unlawful conditions, limitations, powers, trusts, or restraints annexed thereto, as directions for the man-

agement of the fund, and not of the essence of the gift, will fall away and be simply void, leaving the estate still vested in the trustees to be managed in a legal manner for the purposes of the charity."

Philadelphia v. Girard, 45 Pa. St. 1:

"In all gifts for charitable uses the law makes a very clear distinction between these parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration."

Gray on Perpetuities, Sec. 505, says that the question of whether a gift is void because it violates the rule against perpetuities is to be determined by whether the charity begins and not how it ends.

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No. 3833

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM R. CASTLE, LORRIN A. THURSTON and
ALFRED L. CASTLE, trustees under the will of
JAMES BICKNELL CASTLE,

Plaintiffs in Error,

VS.

HAROLD K. L. CASTLE and the TERRITORY OF
HAWAII,

Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR,
HAROLD K. L. CASTLE.

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FILED

MAY 4 - 1922

F. D. MONTGOMERY

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BRIEF FOR DEFENDANT IN ERROR,
HAROLD K. L. CASTLE.

This case comes up on a writ of error from the Supreme Court of the Territory of Hawaii issued on petition of the trustees of the Estate of J. B. Castle, deceased, and is solely concerned with the assessment of an inheritance tax on said estate under the local inheritance tax laws of the Territory of Hawaii. The Supreme Court held that said trustees must pay the inheritance tax and that, under the terms of the will, no part of it was payable by Harold K. L. Castle. This is the only feature of the case in which the present defendant in error, Harold K. L. Castle, is interested.

Statement of Facts.

The facts are succinctly stated in a stipulation in regard thereto signed by all the parties in interest (Record, pp. 1-4), but it will be wise to here briefly refer to them.

The testator's will (Record, pp. 5-21) is long and involved. After one specific devise to his wife of a piece of land, he left the residue of his estate to trustees, with the following directions (omitting certain minor provisions):

(a) To pay \$1500.00 a month and "nothing less" to his widow, Julia White Castle, and to subsequently increase this, if practicable, to not over \$40,000.00 per annum (Record, p. 8).

(b) Upon the decease of the widow, "to continue an income" to his son, H. K. L. Castle, "the *minimum* not to be less than five thousand dollars (\$5000.00) per annum unless caused by financial embarrassment or inconvenience (of which the trustees shall be the absolute judges); the maximum not to exceed forty thousand dollars (\$40,000.00) per annum * * *" (Record, p. 9).

(c) To accumulate land and capital to introduce into the Territory, if possible, a high class agricultural immigration of northern races, and, after fulfilling this and other requirements, to apply the balance of the income, and, after the death of his wife and son, the whole income to a certain educational purpose—namely, a co-educational boarding school devoted primarily to agriculture and domestic science (Record, pp. 9-16, 48-49; 25 Haw. at p. 119).

We do not pretend to exact accuracy in the above description, but it comes fairly close to expressing the testator's objects.

The widow elected to take by way of dower instead of under the will (Record, p. 2; see also *Castle v. Castle*, 267 Fed. 521) and the Supreme Court held this portion of the estate not taxable (Record, pp. 43-47) and there is no dispute on this point.

The widow's election to take dower accelerated the provision in favor of the son (Record, pp. 2, 49; see also *Castle v. Irwin*, 25 Haw. 786, 792), which also is not now disputed, and, by a compromise reached between him and the trustees (*Castle v. Irwin*, 25 Haw. 786, 787), the amount of his annuity has been capitalized and paid over to him. The only question as to him on this appeal is whether he must pay an inheritance tax of \$4569.96, plus interest from October 8, 1919 (Record, p. 3).

The Decision of the Lower Court.

The actual final decision of the Supreme Court in this case is very brief (Record, pp. 60-61) and is based on a prior interlocutory decision (*Id.* 35-51). The court there held as follows:

(a) That a tax on the entire estate (not including the dower interest) was payable by the executors and trustees for the reason that the devise for educational purposes was not to be devoted to those purposes in the sense contemplated by the statute to entitle them to

exemption. In this decision the present defendant in error has no interest.

(b) That the annuity to the testator's son, H. K. L. Castle, was not subject to a tax to be paid out of said annuity, but that the tax was to be paid by the trustees out of the corpus of the residuary estate (Record, p. 37). On this subject, the court says:

“At the hearing on appeal the attorney general has confessed error in the ruling of the circuit judge to the effect that the annuity to Harold K. L. Castle is subject to a tax to be paid out of said annuity. In this we concur and in line with the holding of *Estate of Brown*, 24. Haw. 443, hold that as the residuary clause of the will transfers the entire estate (with the exception of the estate known as Mahuilani on Haleakala, Maui, which is devised to Julia White Castle), to the executors and trustees, the inheritance tax (if any is due) must be paid by the executors and trustees out of the *corpus* of the estate.”

Contentions of Defendant in Error, H. K. L. Castle.

We make three contentions in this case, any one of which, if sustained, is decisive in favor of H. K. L. Castle:

1. That the decision that H. K. L. Castle's annuity was not subject to a tax payable out of said annuity was in accordance with the intent of the testator, in accord with previous rulings of the Supreme Court and right on principle.

2. That the previous decision of the Supreme Court in *Estate of Brown*, 24 Haw. 443, settled the law on this subject in Hawaii; that that decision and the present decision involved the construction of a local territorial statute and that such construction should be deferred to by this court.

3. That the trustees appellant in this case are not interested in the subject in question and have no standing to prosecute an appeal and take the side of one beneficiary as against another and that the Supreme Court of Hawaii has expressly so held in this very matter on two separate occasions.

I.

THE DECISION OF THE SUPREME COURT OF HAWAII THAT H. K. L. CASTLE'S ANNUITY WAS NOT SUBJECT TO A TAX PAYABLE OUT OF SAID ANNUITY WAS IN ACCORDANCE WITH THE INTENT OF THE TESTATOR, IN ACCORD WITH PREVIOUS RULINGS OF SAID SUPREME COURT, AND WAS RIGHT ON PRINCIPLE.

It will be noted that no direct legacy was given to Harold K. L. Castle by the will of his father and that no *property* was *transferred* to him by said will. The entire estate with the exception of a piece of land on the Island of Maui, was devised and bequeathed to the executors and trustees in trust for a very considerable number of purposes. Among these purposes are several small annuities (Record, p. 8) and a provision for a payment of income to the widow (Id). Then comes

the provision for Harold K. L. Castle in the following language:

“Upon the decease of my wife, Julia White Castle, I desire to continue an income to my son, H. K. L. Castle, subject to the following conditions: The minimum not to be less than five thousand dollars (\$5000.00) per annum unless caused by financial embarrassment or inconvenience, (of which the Trustees shall be the absolute judges); the maximum not to exceed forty thousand dollars (\$40,000.00) per annum, which forty thousand dollars (\$40,000.00) shall include the income which he may be receiving from any property which I may give him prior to my decease, including the income from the one thousand (1000) shares of stock in Alexander & Baldwin, Limited, herein mentioned, together with that derived from property derived from his mother.”

(Record, p. 9)

In the said case of the *Estate of Brown*, 24 Haw. 443, the testator similarly transferred, that is, devised and bequeathed, all of his estate, except certain minor items, to his nephew, H. M. von Holt, provided, however, that certain monthly sums should be paid to two named relatives for their respective lives. In each case the testator transferred practically his entire estate to certain persons, charged with the payment of sums of income by the year or by the month to certain other persons. The court in that case held that:

“The inheritance tax is payable upon the transfer of the residuary estate to respondent and not out of the monthly payments to be made to the petitioner.”

24 Haw. 446.

The main reason was stated, as follows:

“It should be borne in mind that the residuary clause transferred the estate, with the exception of the two small legacies mentioned, to the respondent, and by express provision makes the payment to the petitioner of the sum of one hundred dollars monthly a charge upon the estate so transferred to the respondent. Under our tax statutes, inheritance taxes are upon transfers in contemplation of death, and not upon the property transferred. (Authorities cited.) The transfer of the property out of which the monthly payments to the petitioner are to be made is to the respondent, and not to the petitioner.”

Estate of Brown, 24 Haw. 443, 444-5.

The entire opinion of the court in the *Estate of Brown* might be incorporated in this brief as a part of our argument, so directly does it apply.

We submit that the will of James B. Castle, while not expressly providing that the income to be paid to Harold K. L. Castle should be free from any inheritance tax, clearly shows by implication that this is in accordance with the intention of the testator. James B. Castle did not give a fixed sum to his son, either in one cash payment or even from year to year. He provided that an income of a varying amount should be received by his son. He was looking at it from the point of view of how much his son should receive and not how much he (the testator) should give. If the will had worked out as the testator intended, and Mrs. Castle had taken thereunder instead of electing dower, the son would not have begun to receive any income until an indefinite time in the future and during an uncertain period, and even then the amount would have

been entirely uncertain from year to year, depending upon the discretion of the trustees *and the amount the son was receiving from certain other property*. There would be absolutely no basis upon which to figure the amount of the inheritance tax which the son should pay. It is highly unlikely that the testator had in his mind the possibility that the son would have to pay an inheritance tax on this indefinite interest. His thought was that the trust estate as the residuary estate should bear all the expenses and disbursements and that the first charge on the income should be certain sums to be paid to the widow and later to the son. It is true that the widow elected to take dower and that the income to the son has been capitalized and the agreed cash value thereof has been paid to him. But this has no bearing on the question whether the inheritance tax should be paid by the son or out of the residuary trust estate. This question should be examined as of the time of the death of the testator and as if no cash payment had been made to the son. It is a question arising under the statutes and decisions of the Hawaiian courts as applied to said particular will, and the decision should not be affected by the fact that there has been a considerable delay and change of circumstances since the tax became due as of the date of the death of the testator.

As the Supreme Court of Hawaii recognized, while Mr. Castle was deeply interested in the educational charity for which he made provision, his wife and son were still nearer his heart (Record, p. 48), and the charity was to receive only the "excess of income"

“after the fulfillment of the requirements upon the estate as above set forth” (Id. p. 41). His wife and son are the natural objects of the testator’s bounty, and the language of the will and the order of priority established thereby clearly show that, in so far as their interests may conflict with those of the charity, they are to be preferred, and this expression of intention merely confirms what otherwise would be presumed in favor of an heir. The entire scheme of the will shows that Mr. Castle would wish the heavy burden of the inheritance tax to fall upon the residuary educational trust rather than on the provision made for his widow and son. We have in the will Mr. Castle’s own statements as to the amount of income he expects and hopes his wife and son will *receive*, and we submit that his intention is clear that they are to receive this *net*, so far as the estate is concerned, that is, free from any burden connected with the estate either by way of inheritance tax or otherwise.

The authorities cited in the lower court by plaintiffs in error went largely to the point that the inheritance tax is not a tax upon property, which is the very point made by the Supreme Court in the quotation from the *Estate of Brown* heretofore referred to. Authorities from other States are of little assistance on this point, as the statutes generally differ so widely.

“Many authorities have been cited to sustain the contention of respondent, but authorities, unless it appears that the cases decided were under similar statutory and testamentary provisions, are of no assistance here.”

Estate of Brown, 24 Haw. 446.

The court will also observe that the Honorable Attorney General of the Territory of Hawaii realized so fully that the annuity to Harold K. L. Castle could not be held subject to a territorial inheritance tax to be paid by him out of said annuity that, on the appeal from the decision of the trial court assessing such a tax, he not only did not attempt to argue the point, but *confessed error* (Record, p. 37). It should also be noticed that the Supreme Court did not merely decline to consider the point and give a pro forma decision thereon, but that it expressly concurred in the stand taken by the Attorney General and gave its reasons therefor (Id.).

We submit therefore, as stated in this heading, that the decision now appealed from was not only in accordance with prior Hawaiian decisions, but was in consonance with the intent of the testator and was right on principle. Even if, however, we are wrong in this, there are other principles which necessitate an affirmance of the decree.

II.

THE PREVIOUS DECISION OF THE SUPREME COURT OF HAWAII IN ESTATE OF BROWN, 24 HAW. 443, SETTLED THE LAW ON THE SUBJECT IN HAWAII; THAT THAT DECISION AND THE PRESENT ONE INVOLVED THE CONSTRUCTION OF A LOCAL TERRITORIAL STATUTE AND THAT SUCH CONSTRUCTION SHOULD BE DEFERRED TO BY THIS COURT. HEREIN ALSO OF THE CONTENTION BASED ON THE AMENDMENT OF THE TERRITORIAL INHERITANCE TAX LAW IN 1917.

As has already been pointed out, the case of *Estate of Brown*, 24 Haw. 443, absolutely settles the principle

that, in Hawaii, when property is devised or bequeathed to one with a charge that he pay out of it to another a sum in the nature of an annuity, the local territorial inheritance tax is chargeable against the devisee and not the annuitant. That rule was followed in the case at bar on two separate occasions in the progress of the case (Record, pp. 35, 60) and it was therefore held that no tax was payable by Harold K. L. Castle. Every reason of policy calls for the following of these decisions on this appeal. It is quite true that a federal court is not absolutely bound by a decision of a territorial court construing territorial laws in the same way as it is bound by a decision of a state court in construing state laws. Nevertheless, the difference is simply one of degree, and very great weight is given to the decisions of even ordinary territorial courts, where local laws are in question.

This is well illustrated by the case of *Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization of the Territory of Arizona*, 206 U. S. 474; 51 L. Ed. 1143. In that case the legislature of Arizona enacted a law which had been previously enacted by the State of Colorado. When the Act came under consideration in the court, however, the Supreme Court of the Territory of Arizona refused to construe the Act as it had been previously construed by the Supreme Court of the State of Colorado in spite of the well known principle that, where a law of one jurisdiction is enacted in another jurisdiction, the construction given said Act in the former jurisdiction will usually be followed. The Supreme Court of the United States affirmed the judg-

ment of the Arizona court upon the ground that it was a construction of a local statute to which the United States Supreme Court would naturally lean, whether its own opinion was otherwise or not.

We contend that the rule applicable to territorial courts in general should be even more strictly adhered to in the case of appeals from the Supreme Court of the Territory of Hawaii. It must be remembered in this connection that Hawaii has a civilization older than that of many of the states of the Union. The first volume of Hawaiian Reports was published in 1857 and covered decisions for a period of ten years prior to that time. By the time the Islands were annexed to the United States a complete system of jurisprudence had grown up, which placed Hawaii in a very different position from newly organized territories of the United States. Congress recognized this distinction in passing the Organic Act for the government of the Territory of Hawaii, and it nowhere more fully recognized it than in Section 86 of said act, which provided in part as follows:

“The laws of the United States relating to appeals, writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii.”

This law was changed in only one respect by the amendment of the Organic Act in 1905, and that was by providing that writs of error and appeals might be taken to the United States Supreme Court where the

amount involved exceeded the sum of five thousand dollars. This provision was very recently changed so as to confer appellate jurisdiction on this court instead of the Supreme Court of the United States. It is readily apparent, therefore, that considerable distinction should be made between the decisions of the Supreme Court of the Territory of Hawaii and the decisions of ordinary territorial courts. It is also readily apparent that the present case is before this court *not because any provision of the Inheritance Tax Act, a purely local law, is involved*, but simply because the amount involved is more than five thousand dollars.

We now desire to refer to a number of decisions of the United States Supreme Court, passing on decisions of the Supreme Court of Hawaii. The first of these is the case of *Kealoha v. Castle*, 210 U. S. 149; 52 L. Ed. 998. In that case the Hawaiian Supreme Court held, following an earlier decision, that a law legitimating children born out of wedlock upon the marriage of their parents was not applicable to the issue of an adulterous relation. As will be observed from a reading of the cases, the previous Hawaiian decision on this point was in conflict with the decisions of practically all the states of the Union. Nevertheless the United States Supreme Court held that it was a matter of local law, and that the decision of the court on the spot should be followed.

The next case is that of *Cotton v. Hawaii*, 211 U. S. 162; 53 L. Ed. 131. This case involved the question of what constituted a final judgment in the Territory of Hawaii and the United States Supreme Court, in fol-

lowing a Hawaiian decision which was promulgated a considerable time after a right of appeal to the Supreme Court of the United States had been given, said *inter alia* :

“The statutes, it will be observed, confer no express power upon the Supreme Court of the territory to enter a final judgment in a cause upon the overruling of exceptions, and, indeed, that the Supreme Court of the territory does not construe the territorial statutes as giving it such authority, and, therefore, that the court could not have intended to exert such power in this case, so conclusively appears from recent decisions of the Supreme Court of Hawaii as to leave the question *not open to controversy.*”

Later, in the same opinion, the Supreme Court of the United States expressly points out that it is applying the construction given by the Supreme Court of Hawaii to the local statutes of that territory.

We will refer next to the two Atcherly cases. In the first of these, *Lewers & Cooke v. Atcherly*, 222 U. S. 285; 56 L. Ed. 202, the court held that it would follow the decision of the Hawaiian Supreme Court to the effect that a judgment of the Land Commission of Hawaii could not be attacked except by a direct appeal to the Supreme Court of the territory, as provided by law. In its opinion in this case the Supreme Court of the United States points out very forcibly the great weight which should be given to the opinion of the court upon the spot in construing local laws, and also points out the special reasons for following this course in the case of the courts of Hawaii.

The same question which was involved in the above case came again before the Supreme Court of Hawaii in the case of *Kapiolani Estate v. Atcherly*, 21 Haw. 441. In that case the Supreme Court of the territory came to the conclusion that its previous decision in the case of *Lewers & Cooke v. Atcherly*, which had been affirmed by the United States Supreme Court, was erroneous, and that, as a matter of fact, the plaintiff was entitled to go behind the judgment of the Land Commission referred to in that case. The Supreme Court of Hawaii stated that it would reverse its previous decision, therefore, except for the fact that it was bound by the affirmance of that decision by the Supreme Court of the United States, using in part the following language:

“It makes no difference that in making that decision the Supreme Court followed the opinion of this court upon a matter of *local law*, and that we now believe that that opinion was not well founded. If the former ruling is to be reversed, the reversal is to be made by that court, and not this. The most that we can do now is to respectfully point out wherein, in our judgment, the former opinion was wrong. This we have done, believing it was our duty to do it, and with this our duty in the premises ends.”

This case was also taken to the United States Supreme Court, which held that, as the Hawaiian Supreme Court now took a different view of the effect of the Land Commission award in question, it would follow such new view, even though contrary to its previous decision, and, therefore, it reversed the decision of the Hawaiian Supreme Court and ordered that judgment be entered in the way said court had held the

same should have been entered, if it had not been bound by the earlier decision of the Supreme Court of the United States (238 U. S. 119; 59 L. Ed. 1229).

The next case to which attention is called is the case of *John Ii Estate v. Brown*, 235 U. S. 342; 59 L. Ed. 259. In that case the construction given by the Supreme Court of the Territory of Hawaii to a will written in the Hawaiian language was sustained as against the construction given by the federal court of the territory and affirmed by *this* court, and yet, from an examination of the will in question, it is very apparent that the construction given it by the Hawaiian Supreme Court was clearly wrong, and the construction by the federal courts in question was as clearly right.

In the case of *Halawa Plantation v. County of Hawaii*, 22 Haw. 753, the Supreme Court of Hawaii decided that, under the Hawaiian County Act, counties were not liable for the torts of their employees. This was a marked departure from the general rule of the various state courts, but, in affirming that decision, *this* court said:

“The construction which the Supreme Court of the territory has put upon the local statutes pertaining to county organization and to powers and liabilities of counties in the territory is entitled to great weight. This is especially pertinent in the present case, because the Legislature of Hawaii with knowledge of the judicial construction adopted by the Matsumura decision has met in four sessions since the court declared the law, and although it has amended the county act in several other respects, it has failed to change the law as announced in that opinion and decision. Revised Laws of Hawaii 1915, Secs. 1503, 1507-1517, 1527, 1531, 1554,

1565, 1573; *McChesney v. Hagar* (Ky.) 104 S. W. 714.”

Hawaii County v. Halawa Plantation, 239 Fed. 836, at p. 839.

It is true that in *Castle v. Castle*, 267 Fed. 524, this court held that, in passing on a question of dower which was “very broad” and of a “general nature”, it would not follow the Hawaiian Supreme Court (when that court was clearly wrong). The same can hardly be said, however, of the Hawaiian inheritance tax law and, moreover, there was no *prior* decision involved in that case as there is in this one. Dower statutes date from very early times, but inheritance tax laws are new and constantly changing and no two of such laws are exactly alike.

Counsel for the trustees pointed out in the lower court that the Hawaiian inheritance tax law was amended by Act 223, Session Laws of 1917, after the death of Cecil Brown, the testator in the case of *Estate of Brown*, *supra*, and that, by reason of said amendment, the decision in that case is not applicable. It would seem a sufficient answer to this argument that, when the decision in question was rendered, the amendment was in force and that no comment was made on it, but we can go much farther than this. The amendment was of Section 1323 of the Revised Laws of Hawaii (1915). This section as originally enacted and *as re-enacted in the amendment* provided for inheritance taxes on all property passing by will. So far as pertinent, it reads as follows:

“All property which shall pass by will * * *
to any person or persons * * * in trust or other-

wise, or by reason whereof any person * * * shall become beneficially entitled * * * to any property or to the income thereof, shall be and is subject to the tax hereinafter provided for * * * ”

The law as originally enacted provided for uniform rates of 2% for near relatives and 5% for all others. The sole purpose of the amendment, as will be plainly seen by reading it, was to fix *new rates* and *not* to change *the substantive law*. In creating these *new rates* for contingent or conditional estates in trust, the amendment further provided that

“a tax shall be imposed upon said transfer *at the highest rate* which on the happening of any of said contingencies or conditions, would be possible under the provisions of this Act, and such tax so imposed shall be due and payable forthwith by the executors and trustees out of the property transferred.”

This amendment does not purport to make, and does not make, any substantive change of the law as to what interests or estates are taxable or from what funds taxes are to be paid. Surely the legislature, if it had intended to make such an important change as that claimed by plaintiffs in error, would have covered the matter more clearly and fully and would not have left the change to be implied or inferred. Furthermore, the amendment says that the tax shall be payable “out of the property *transferred*” and the very point on which both the opinion in the *Estate of Brown* and the opinion in the *Estate of Castle* are based ^{is} ~~in~~ that in *each* case the will *transferred* the *entire* estate to someone other than the annuitant, that is, to H. M. von Holt, residuary legatee in the former case and to the trustees in the latter case. Finally, the amendment in question was in

full force and effect when *this case* was decided (not being mentioned in the opinion because it deserved no mention) and the rule as to following local law applies almost as strongly to following that decision as to following the decision in *Estate of Brown*. To overturn *both* decisions, however, on a matter of local law, would be unusual if not unprecedented (see *Ii Estate v. Brown*, supra; *Kealoha v. Castle*, supra; *Hawaii County v. Halawa Plantation*, supra).

In view of the decisions of the United States Supreme Court heretofore cited, we submit that this court will unhesitatingly follow the ruling in *Estate of Brown*, supra, and the similar ruling, *twice* made, in *this case*. We also submit that to reverse the decisions of local courts on matters of local law in a case which has come to this court, *not* because such local law is involved, but simply because there is over five thousand dollars in controversy (and just barely that in this case so far as H. K. L. Castle is concerned), would be to create an extremely bad precedent. We therefore respectfully submit that these decisions should be accorded controlling weight on this appeal.

III.

THE TRUSTEES APPELLANT IN THIS CASE HAVE NO STANDING TO PROSECUTE THIS APPEAL AND TAKE THE SIDE OF ONE BENEFICIARY AS AGAINST ANOTHER AND THE SUPREME COURT OF HAWAII HAS EXPRESSLY SO HELD IN THIS VERY CASE ON TWO SEPARATE OCCASIONS.

When a case is appealed to this court from the Supreme Court of the Territory of Hawaii, one would

naturally expect that a *complete* record of the proceedings in the case would be sent up. This has not been done in this case and two *very* important decisions of the court are omitted from the record. We make no technical point in regard to this, however, and, as the decisions in question are fully reported, the omission is of little importance. We are convinced that the plaintiffs in error are acting in entire good faith, but we are also convinced that, in demanding that Harold K. L. Castle pay a tax on his interest in the estate, it is difficult to explain their attitude. We shall quote from the decisions in question without comment.

In *Castle v. Irwin*, 25 Haw. 786, 789-790, the court said:

“Counsel for the trustees have moved the court for permission to perfect their appeal and have filed a motion for the issuance of a writ of certiorari directing the clerk of the court below to transmit here ‘the appeal and notice of appeal of said petitioners filed in said circuit court November 26th, 1920’. Mr. Withington, of counsel for the trustees, stated at the outset of his argument that the trustees had not appealed from the decree of the court below *because their position being neutral they had no appealable interest in the controversy*. While not deciding the question we are free to say that there appears to be much force in counsel’s position for it is the general rule that executors, administrators and trustees are in their official capacity indifferent persons as between the real parties in interest. The funds which come into their hands are held in *custodia legis* to be distributed by the court to those who show themselves entitled to them and it is their duty to distribute the money coming into their hands as the court shall direct. Applying this rule to an executor who attempted to appeal from the decree of the superior court the

supreme court of California in *Estate of Marrey*, 65 Cal. 287, speaking through Mr. Justice McKinstry, said: 'The appeal of the executor from the decree of settlement and disposition must be dismissed. He cannot in any case litigate the claim of one legatee as against the others at the expense of the estate'. In the present case all the beneficiaries under the will except Titus M. Coan are satisfied with the decree of the court below, and the right of the trustees to prosecute an appeal at the expense of the estate is, to say the least, doubtful. See also *Bryant v. Thompson*, 128 N. Y. App. 426. In the New York case the trustees under the will of Francis W. Tracy brought an action for the construction of the will and asked the court to determine which of two parties was entitled to certain funds in plaintiffs' hands as trustees. The judgment rendered decided the question and this was acquiesced in by both of the alleged claimants to the funds who were parties and were of age. The court held that under the law of New York the right to appeal is limited to a party aggrieved and as plaintiffs were not aggrieved by the judgment they were not entitled to appeal.

The supreme court of Hawaii in *Haw'n Trust Co. v. Holt*, 24 Haw. 212, recognized and applied the well known rule to the effect that a party to a suit cannot appeal from a judgment or decree if he is not thereby affected. See also *Virden v. Hubbard*, 37 Colo. 37; *Goldtree v. Thompson*, 83 Cal. 420. It is true that our local supreme court in *Haw'n Trust Co. v. Galbraith*, 22 Haw. 78, sanctioned the right of the trustees to appeal, but in that case the trustees had a personal pecuniary interest in the decree of the court from which the appeal was taken."

In a decision on a petition for a rehearing in the same case, 25 Haw. 807, 810-812, the court further said:

"But aside from these questions there is a fundamental principle of law which is a complete bar to the granting of this application for a rehearing as

well as to the recognition of any right of the trustees to have a review of the decree of the court below by a writ of error or otherwise. It is a principle of appellate procedure which runs in a true course through all the text books, reports and statutes. It is referred to in our former opinion and is to the effect that the appellate jurisdiction of this court, can only be invoked by a party aggrieved by the decision, judgment, order or decree of the court below. See *McCandless v. Pratt*, 211 U. S. 437, and authorities cited in the former opinion in this cause. The same principle is recognized in Act 45 supra in the following language: 'In case the decision, judgment, order or decree sought to be reviewed was rendered *against* two or more persons * * * all such cases shall be determined as if *all such persons* had joined in the appeal.' The decree in this case which Coan has brought here for review was not rendered against, nor does it affect, the trustees. They brought their bill in equity in the court below to obtain a construction of the will of James B. Castle, deceased, and to have a confirmation and approval of a compromise agreement which they had entered into with Harold K. L. Castle, a son of the deceased and one of the legatees named in the will. The court below entered a decree construing the will as requested, and in conformity with the former opinion of this court and also approved the compromise agreement between the trustees and Harold K. L. Castle in one of the alternate amounts agreed upon between them. From this decree Coan has perfected an appeal which has been disposed of by an affirmance of the decree of the lower court. Neither the trustees, Harold K. L. Castle, nor the attorney general, representing the public charity, have appealed. Harold K. L. Castle is satisfied with the decree below and so is the attorney general, *who in fact represents the only interest which might claim to be substantially aggrieved by the decree of the court below. The trustees are not affected one way or the other. It should be no concern of theirs whether that portion*

*of the funds of the estate in question be given to the son of the deceased or devoted to the purpose of the boarding school contemplated in the will. Both of these interests are represented by able and competent counsel who are fully qualified to protect the interests which they respectively represent and they have acquiesced in the decree below. The trustees should occupy a neutral and indifferent attitude in any controversy between the real parties in interest and clearly they ought not to be allowed to litigate the claim of one such interested party as against another such party. If the estate itself as an entity is attacked it would be the duty of the trustees to defend and if such defense requires that an appeal be prosecuted it would then be the duty of the trustees and they would have the undoubted right to prosecute an appeal. So if the interest of the estate require the bringing of a suit such suit should be brought in the name of the trustees and in the event of an unfavorable judgment or order the trustees should appeal therefrom if such appeal would be proper to protect the interests of the estate. But beyond this neither their duty nor their rights will permit them to go. With controversies which affect the individual interests alone of those who may be interested in their trust they have nothing to do and consequently cannot be aggrieved by a decree which affects those individual interests. See *Goldtree v. Thompson*, 83 Cal. 420."*

Although these decisions were rendered in regard to an attack by the trustees on the acceleration of Harold K. L. Castle's interest in the estate (which they no longer dispute), it is difficult to distinguish them in their bearing on the present dispute, wherein the trustees claim that Harold K. L. Castle should pay the inheritance tax on his annuity in order to prevent such tax from falling on *other* interests.

We leave it to *this* court to say whether, in view of the above and in view of the previous admissions of the trustees that they were "neutral" and had "no appealable interest in the controversy" and in view of the fact that "the attorney general, representing the public charity * * * who in fact represents the only interest which might be claimed to be substantially aggrieved" makes no complaint, the plaintiffs in error should be allowed to attack the decree now under review so far as it affects the interests of Harold K. L. Castle. We present no argument on the point other than the decisions above noted, we make no contention that the record on appeal is incomplete and we leave it to the court to say whether the trustees are, under the circumstances, entitled to *now* claim a payment of \$4,569.96 and interest from our client, both in view of their past attitude and in view of their lack of interest in the subject matter of the litigation.

IV.

REPLY TO BRIEF OF PLAINTIFFS IN ERROR.

The foregoing part of this brief was written before receipt of the brief of our opponents and we desire to make a short answer to some of their contentions, although it is somewhat difficult to discover from said brief what those contentions are.

On page 2 of the brief plaintiffs in error refer to the provisions of Act 223 of the Session Laws of 1917 amending Section 1323 (erroneously referred to as Section 1325) of the Revised Laws of Hawaii. It would have been fairer to have shown what the original law

was and *how* it was amended. The amendments simply fixed *new rates* of taxation, as already pointed out, and made no change in the substantive law. The entire discussion as to the amendment is misleading and raises a false issue.

In the citations on pages 10 and 11 of the brief, plaintiffs in error wholly lose sight of the real principle involved in this case. Undoubtedly, where specific bequests are made in trust, it is generally the beneficiary and not the trustee that pays the tax, but even in such a case, if the will clearly indicates that the legacy is to be free from the tax (as the instant will clearly does in regard to Harold Castle's indeterminate and indefinite annuity), no tax is payable by the legatee.

37 Cyc., 1577, and cases there cited.

In the case at bar, however, the *real* residuary legatees are the trustees themselves, just as H. M. von Holt was the residuary legatee in the case of *Estate of Brown*, *supra*. They are given almost absolute discretion as to how much they will pay to the widow, the son, the fund for immigrants and the boarding school and it is impossible to properly apportion the taxes and do justice, for we must look to the situation created *by the will* and not the situation actually brought about by the election of the widow to take dower, the acceleration of the son's interest and the determination and capitalization of that interest. The facts in the cases cited are wholly different from the facts in the case at bar. Appellants' real point in this connection is that the prior decision of the Hawaiian Supreme Court in *Estate of Brown*, *supra*, is wrong, but we do not believe that this court will so hold.

Plaintiffs in error say that they have found no case holding that trustees are successors to legacies under tax laws. Nor is there any such holding in the case at bar. The holding simply is that the trustees must *pay* the inheritance tax "out of the corpus of the estate" (Record, p. 37). Moreover, no such will as the present was involved in the cases cited by plaintiffs in error and those cases are of no importance. "Authorities, unless it appears that the cases decided were under similar statutory and testamentary provisions, are of no assistance here" (*Estate of Brown*, 24 Haw. at p. 446).

The citation from *Estate of Dillingham*, 25 Haw. 129, is in no way in point and needs no comment. In that case the testator's residuary estate was bequeathed equally to his four children and no trust of any kind was involved (25 Haw. at page 131). The legatees therefore had, of course, to pay the territorial inheritance tax on their interests.

Plaintiffs in error seem to have some complaint (just *what* is not clear) as to the *rate* at which the tax was levied, but we are not interested in this point. If the court holds that a different and lower rate should be paid on the annuity of Harold Castle than on the balance of the estate, we have no objection whatever. *Our* point is that the tax is payable out of the corpus of the estate and is not to be deducted from Harold Castle's indeterminate annuity. As to this last question the trustees have no interest whatever, as has already been shown, and their writ of error (as regards Harold Castle) should be dismissed on this ground alone.

Plaintiffs in error admit that the decision of a territorial court construing a local statute should not be disturbed unless there is "manifest error" (Brief, p. 14). Their further conclusion that there *was* "manifest error" in this case is wholly unsound. The most that could possibly be said is that the subject is not wholly free from doubt and, in view of the *prior* decision in *Estate of Brown*, *supra*, we do not think that this court will be disposed, under *any* circumstances, to reverse the present decision.

We find it very difficult to discover whether plaintiffs in error really contend that Harold Castle should pay any tax or whether they merely complain of the rate of the tax. As, however, they have no interest in the former subject, we will not pursue the matter further, except to say that they should not be given something they do not specifically ask for.

Plaintiffs in error see fit to discuss the question whether the charitable trust is a valid one. If it is not valid, the entire estate would go to Harold Castle. We wish to make it entirely clear, however, that Harold Castle in no way attacks this trust and that he fully respects his father's wishes in this regard. He seeks nothing that is not fairly and honorably his, but he does object to paying money which his father plainly intended that he should not pay.

Dated, May 1, 1922.

Respectfully submitted,

ROBBINS B. ANDERSON,

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S. H. DERBY,

Attorneys for Defendant in

No. 3833

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

WILLIAM R. CASTLE, LORRIN A.
THURSTON, and ALFRED L.
CASTLE, Trustees under the Will
of JAMES BICKNELL CASTLE,

Plaintiffs-in-Error,

vs.

HAROLD K. L. CASTLE and the
TERRITORY OF HAWAII,

Defendants-in-Error.

No. 3833.

*In Error to
the
Supreme
Court
of Hawaii.*

REPLY BRIEF OF THE TERRITORY OF HAWAII,
ONE OF THE DEFENDANTS-IN-ERROR.

*Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.*

HARRY IRWIN, Attorney General
of Hawaii, Attorney for Ter-
ritory of Hawaii, Defendant-
in-Error.

Filed this.....day of.....1922

F. D. MONCKTON, Clerk,

By.....Deputy Clerk.

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NO. 3833

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WILLIAM R. CASTLE, LORRIN A.
THURSTON, and ALFRED L.
CASTLE, Trustees under the Will
of JAMES BICKNELL CASTLE,
Plaintiffs-in-Error,

vs.

HAROLD K. L. CASTLE and the
TERRITORY OF HAWAII,
Defendants-in-Error.

REPLY BRIEF OF THE TERRITORY OF HAWAII,
ONE OF THE DEFENDANTS-IN-ERROR.

*Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.*

The opening statement contained in the brief filed by plaintiff-in-error is, in the main, correct and fully and correctly sets forth all the provisions of Hawaiian statutory law which are applicable and pertinent to the case now under consideration.

The statement that "all surplus income to accumulate during and with the remainder at the expiration of said annuity to be devoted to an educational charity" is however incorrect. In order that this error may be made clearly apparent and in order that all the questions involved in the proper construction of this will may be clearly understood it is deemed advisable to

first set out an analysis of the will under and by which the property in question was transferred to the trustees, the plaintiffs-in-error herein and showing the successive trusts which by that instrument were imposed on said Trustees.

Analysis of the Will.

The entire estate (except Mahuilani) was devised and bequeathed to the Trustees for the following purposes which, without taking into consideration the annuity to the widow and certain other small annuities all of which are eliminated from further consideration by rejection or the death of the annuitants, were to be executed in the order named in the will and as here set forth, namely:

(1) For the payment of debts and funeral expenses (Record 5);

(2) The rehabilitation of the Kona Development Company, Limited with authority in the Trustees to sell "old securities" for the purpose of liquidating the "heavy indebtedness" existing against this company (Record 5-6);

(3) The financing of the West Hawaii Railway Company and the Koolau Railway Company by the sale of \$400,000.00 worth of the capital stock of Alexander & Baldwin, Limited (Record 6);

(4) For the carrying out of the purposes mentioned in paragraphs numbered 2 and 3 supra, including the extension of the Koolau Railway to Honolulu the executors and trustees are empowered "completely to deal with any and all securities which I may possess, and otherwise, so far as lies within their

power, to finance such enterprises as I would have the power to do were I living." (Record 7);

(5) *After the successful establishment of the industries mentioned in paragraphs numbered 2, 3 and 4 supra to increase the annuity to the widow (Record 8);*

(6) *After the death of the widow to pay to the son an annuity of not less than \$4,000.00 nor more than \$40,000.00 (Record 9);*

(7) *To accumulate sufficient land and capital for the establishment of other agricultural enterprises for the introduction and employment in Hawaii of "a high class agricultural immigration of Northern races, preferably Scandinavian, Anglo-Saxon and Teutonic" (Record 9);*

(8) (a) *Subject to the decision of the executors to devote either the excess income or the whole income of the estate "to any business enterprise whatsoever which they may approve"* and (b) *after the fulfillments of the requirements upon the estate as set forth in paragraphs numbered 1 to 7 inclusive, supra, and (c) after the death of the widow and son and other beneficiaries "to accumulate the income toward an educational purpose to be initiated at such time as their judgment will determine the estate amply able to carry on without closing its commercial character."* (Record 10, 11);

(9) *The powers vested in the Executors and Trustees to carry on any and all of said business enterprises are subject both as to extent and duration, only to their uncontrolled and unlimited discretion (Record 17).*

ARGUMENT

For the purposes of this argument the questions raised by the various assignments of error may be grouped generally in two questions, namely,

(1) Was the tax on the annuity to Harold K. L. Castle payable by the annuitant or by the Trustees?

(2) Did the devise and bequests to the Executors and Trustees, according to the terms and conditions of the trust, constitute a taxable transfer under the Hawaiian Statute? (Assignments of error 1, 2, 4, 6, 7, 8 and 9.)

FIRST QUESTION:

Was the tax on the annuity to Harold K. L. Castle payable by the annuitant or by the Trustees?

The entire estate was transferred to the executors and trustees.

"All the rest of my estate, real, personal and mixed, I devise and bequeath to my executors and trustees hereinafter mentioned" (see Will, Record 5).

The executors and trustees took the entire estate, legal and equitable, subject only to the trusts imposed on them by the will. This brings this case squarely within the principles announced in *Estate of Brown*, 24 Haw. 443, where the Supreme Court of this Territory said:

"It should be borne in minds that the residuary clause transferred the estate, with the exception of the two small legacies mentioned, to the respondent and by express provision makes the payment to the petitioner of the sum of one hundred dollars monthly a charge upon the estate so transferred to the respondent.

Under our tax statutes, inheritance taxes are upon transfers in contemplation of death, and not upon the property transferred (*Brown v. Treasurer*, 20 Haw. 41; *Robinson v. Treasurer*, 22 Haw. 742, 748). The transfer of the property out of which the monthly payments to the petitioner are to be made is to the respondent, and not to the petitioner. A charge of this kind only creates a lien and does not transfer the estate or create an interest therein, the title to which passes to the devisee, and not to the party to whom the charge is payable. The will devolves upon respondent the duty of paying to petitioner the monthly payment of one hundred dollars, and it is apparent from the language used by the testator that he intended that such payments should be made without deduction for any cause whatever. Should petitioner die the payments would stop. Suppose she should die within one or two years the difference between the monthly payments made to her and the said valuation of \$18,078.11 would remain in the hands of respondent to whom all of the residuary estate of testator passed under the will. The position of petitioner is analogous to that of a creditor where the will devises the estate to one with the charge that he shall pay the debt. Nothing would be transferred to the creditor by the will, yet it would create a lien upon the estate in his favor for the payment of his debt, and he would not be chargeable with the inheritance tax. No title or interest was transferred to the petitioner by the will; she was given a lien thereon for certain monthly payments of indeterminate value, notwithstanding the probable value thereof as shown by mortality tables. See *Potter v. Gardner*, 12 Wheat. 498; *Rohn v. Odenwelder*, 162 Pa. St. 346; 4 Kent's Com. 540. In *Thayer v. Finnegan*, 134 Mass. 62, the testatrix appointed her eldest son executor and gave him all her property, he to pay her debts and expenses of schooling her younger son. The Court held that such debts and expenses of schooling were charges upon the estate transferred to the eldest son. Nothing was transferred to either the creditors or younger son

but the payments of their debts in the one instance, and expenses of schooling the younger son in the other, were charges that created liens upon the estate. That case is analogous to the case at bar. The inheritance tax is payable upon the transfer of the residuary estate to respondent and not out of the monthly payments to be made to the petitioner. Many authorities have been cited to sustain the contention of respondent, but authorities, unless it appears that the cases decided were under similar statutory and testamentary provisions, are of no assistance here."

THE DECISION IN *ESTATE OF BROWN* IS CONTROLLING IN THIS CASE.

The argument in the Brown case is equally applicable here. Suppose Harold K. L. Castle should die within one or two years the difference between the annual payments made to him and the admitted value of the annuity of \$183,165.53 (See Record 2) would remain in the hands of the trustees to whom all of the residuary estate of the testator passed under the will.

The case "Estate of Brown" was decided on August 30, 1918, and it is submitted that under our statute there is no such manifest error as would prevent the application of the rule of construction of a local Hawaiian law. Since the date of the decision in the Brown case there have been two regular and one special session of the Legislature of Hawaii and no attempt has been made to change or modify our Inheritance Tax statute in respect to the principles announced in said case. It is generally held that acquiescence on the part of the Legislature in a particular construction of a statute is indicative of legislative assent to such construction.

“When an act of Congress has, *by actual decision*, or by continued usage and practice, received a construction at the proper department and that construction has been acted on for a succession of years it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given it.”

2 Opp. Atty. Gen. 558.

“This construction (a decision by the Treasury Department) has been followed for many years *without any attempt of Congress to change it* and without any attempt so far as we are advised of any other department of the government to question its correctness except in the present case. The regulation of a department of the government is not of course to control the construction of an Act of Congress when its meaning is clear. But when there has been a long acquiescence in a regulation and by it rights of parties for many years have been determined and adjusted it is not to be disregarded without the most cogent and persuasive reasons.”

Robertson v. Downing, 127 U. S. 607, 32 Law Ed. 269-271.

Under these authorities the fact that the Legislature of Hawaii during three sessions held subsequent to the decision in the Brown case failed to change or amend the statute which was then the subject of interpretation should be regarded as an acquiescence by the Legislature in that interpretation and as correctly expressing the intent of the Act.

THE DECISION IN *ESTATE OF BROWN* IS SUPPORTED BY AUTHORITY.

Counsel for plaintiff-in-error state in their brief on page 11 that, after an extensive search of authorities, they are unable to find a single decision of a court of last resort which holds that trustees are successors to legacies under state laws.

In this connection the Court's attention is respectfully invited to a consideration of the case entitled *Farkas vs. Smith*, 147 Ga. 503, 94 S. E. 1016.

That case was decided under a statute somewhat similar to ours and under a will very similar to the will in this case. The testator died leaving eight children. He devised and bequeathed his entire estate to five of these children in trust for the benefit of all for their lives with remainder over. The Trustees were given "entire control over the management and use of said "property", were authorized "to sell any part of the estate", "to continue any business that I (the testator) may be engaged in" or to "discontinue and sell the same." Upon the attainment of majority of the youngest grandchild the trust was to terminate and the estate distributed, per stirpes, among the direct descendants of the testator.

Section 1 of the Georgia Statute provides in part as follows:

"All property within the jurisdiction of this state, real and personal, *and every estate or interest therein* belonging to the inhabitants of the State—which shall pass on the death of the decedent by will—to any person or persons, bodies politic or corporate, in trust or otherwise, shall be subject to taxes."

Section 4 of the act makes provision for the method of levying the tax on estates less than fee.

Section 10 of the act makes provision for the taxation of limited estates and is almost identical in language with the last paragraph of Section 1323, R. L. H. 1915, as amended by Act 223, Session Laws 1917.

It was there contended that the provisions of said Sections 4 and 10, apportioning the tax where different estates are created in the same property were unenforceable when applied to the will of said Farkas on account of the peculiar character of the several estates created by the will.

The Supreme Court of Georgia in holding that the tax was properly levied on the whole estate which was transferred to the Trustees said:

“It is to be borne in mind that the tax is upon the transfer. A transfer might have resulted by operation of law as by inheritance in cases of intestacy, in which event there could have been no contingent or indefinite estates. The transfer under consideration, however, was not of that character. On the contrary, it was the case of a will. The will might have devised the property directly to those whom the testator intended should enjoy the bounty; or, some of those intended to enjoy the estate being minors and others being indeterminate, he could, under Section 1 of the Act, have made the bequest directly to a trustee, and let the uses enjoy the property thereafter. In this instance the testator resorted to that expediency. The statute contemplates cases of this kind, and by Section 1 it provides for taxing transfers made to a trustee. In such a case, if the trust comprehends the fee, legal title to the property passes, entirely out of the estate of the testator and into the trustee. This accomplishes a

transfer which is taxable within the meaning of the act; for there can be but one transmission by the testator, and, when it is to a trustee who takes the legal title to the fee, the trustee becomes the other party to the succession, and the taxable transmission becomes complete. In such instance the taxable transfer to the trustee is not "divided into two or more estates", within the meaning of Section 4 of the act. The broad language of the trust created by the will of Sam Farkas shows that the trustee took for the benefit of all the legatees under the will, thus causing the trust to extend to the fee. *McLain vs. Rabon*, 142 Ga. 163, 82 S. E. 544. This being true, there were no executory interests in remainder or otherwise attaching to the transfer, (the subject of taxation) within the meaning of the act and therefore there was no occasion for the separate assessment upon the property left by the testator. The trustee receiving the property in solido by the transfer to them, the entire tax would be payable out of the property in the first instance, as provided in Section 10 of the Act.

This case affords an example for applying sections 1, 4 and 10 of the act, and serves to illustrate the consistency between those provisions. The transmission of title, by operation of law or otherwise, from the trustees to the cestuis que trustent ultimately entitled to the enjoyment of the property, will not be taxable, because the statute imposes the tax upon but one transfer, namely, that from the testator to the trustee which went into effect at the death of the testator. In view of the complicated character of this will, it would be difficult to apportion the proper amounts of the tax against the separate interests of the various cestuis que trustent in the property, and much inconvenience and delay might be encountered by the state in collecting the tax. Broad powers were conferred upon the trustees over the property of the testator in the matters of sales and disposition of the property and conduct of the business left by the testator. However, any disposition of the property without payment of the tax would be subject to the lien of the tax, and to that

extent would be to the disadvantage and inconvenience of the trustees. On the other hand, if, by business misadventure or otherwise, the property left by the testator should be lost, or in any manner wasted, pending delay in paying the tax, it would operate to the inconvenience and injury of the state. Such possibilities, no doubt, were taken into account when the legislature provided for the tax in cases of transfers to trustees. The view which we take of this act, as applied to the will under consideration, brings us to the conclusion that the tax was properly levied in the hands of the trustees in solido."

It was exactly upon the theory set forth in the Georgia case, although in not the same language, that the Supreme Court of Hawaii in the Brown case said that "the transfer of the property out of which the monthly payments to the petitioner are to be made is to the respondent and not to the petitioner."

THE DECISION IN THE *ESTATE OF BROWN* IS IN CONFORMITY WITH THE AMENDMENT OF 1917 AS CONSTRUED BY OTHER COURTS.

Counsel for plaintiffs-in-error emphasize the fact that the law has been changed since the decision in the Brown case by Act 223, S. L. 1917, "wherein it is ordered that the tax on legacies should be paid 'out of the proceeds of the property transferred.' " (Brief 15.) Counsel here refer to that part of said Act 223, S. L. 1917, which is set forth in the last paragraph of Section 1323, R. L. H. 1915, as amended. (Brief 7 and 8.) A reading of that paragraph will convince the Court that it makes no such provision and that it simply provides, so far as this case is concerned, "when

property passes as provided herein in trust * * * such tax shall be due and payable forthwith by the executors or trustees out of the property transferred."

It is difficult to see how counsel can twist this plain provision of the statute into an order that the tax on an annuity should be paid out of the annuity.

The provisions of the New York statute are identical with those of the Hawaiian statute in this regard and *In re Vanderbilt's case*, 172, N. Y. 69, 64 N. W. 782, it was clearly held that under similar facts the tax on a contingent remainder was payable out of the corpus of the estate by the trustee.

In that case, the Court, by Mr. Justice Haight, after quoting the section of the New York law which is identical with ours said

"It seems to be clear that the legislature by this amendment intended to change the law upon the subject and to make the transfer tax upon property transferred in trust payable forthwith. The tax is not required to be paid by the conditional transferee for by the provisions of the statute it is 'to be paid out of the property transferred' so that whoever may ultimately take the property takes that which remains after the payment of the tax."

Mr. Justice Cullen in a concurring opinion said:

"It is conceded that the statute on its face provides for the immediate taxation of the whole corpus of the trust estate regardless of the fact that the persons who may ultimately receive either the whole or part of such corpus cannot now be ascertained, and for the payment of the tax out of the fund. I concede that if the statutory scheme creates a property tax it cannot be sustained. * * * But in my opinion the tax now sought to be imposed is not a property tax * * *.

The fact that the tax is to be paid out of the property does not render it a tax on property."

The New York Court of Appeals affirmed the decision *In re Vanderbilt supra* in a case entitled *In re Tracy, et al*, 179 N. Y. 501, 72 N. E. 519. That was a case where the testator devised and bequeathed certain property to trustees subject to certain life estates and estates in remainder and the Court said:

"In the case at bar it is the duty of the executors and trustees to ascertain the value of the respective life estates and estates in remainder * * * and having done this they should compute the transfer tax and pay the same forthwith out of the property transferred. The result is that the life tenant loses during the continuance of his estate the interest upon the corpus of the estate so paid out and eventually the remainderman receives his estate diminished by the amount of said payment * * *. As we read the statute the legislative intention is clear that the transfer tax shall be paid out of the corpus of the trust estate and not out of the income."

THE CASE *ESTATE OF BROWN* WAS NEITHER OVERRULED OR MODIFIED BY THE DECISION IN *ESTATE OF DILLINGHAM*.

Counsel for plaintiffs-in-error seem to contend that the *Brown* case, *supra*, was overruled or modified by the decision in *Estate of Dillingham*, 25 Haw. 129.

That case was entirely dissimilar from the one under consideration. In the first place there was no transfer to trustees the transfer having been made by the will directly to the four children of the testator.

"The record before us does not contain the pro-

visions of the will and codicils involved but from statements of counsel for the executors made in argument and acquiesced in by the Attorney General it appears that by the term of the will and codicils all of the residuary estate of the testator and which constitutes the bulk of his estate is bequeathed to his four children in equal portions and that it is the tax to be paid on these bequests that is here involved." See page 131 of decision in Dillingham case.)

In the second place the only question before the Supreme Court of Hawaii in the *Dillingham* case was the question as to whether or not the amount of money paid by the Executors in settlement of the Federal estate tax was deductible from the corpus of the estate before computing the amount of the tax due to the Territory of Hawaii from the four children to whom the bulk of the estate was transferred and to settle that matter the following question was reserved to the Supreme Court of the Territory, namely:

"Whether or not the estate tax paid or payable by said executors upon or in respect to said estate under the laws of the United States is deductible from the gross proceeds of said estate for the purpose of assessing and fixing *the values of said bequests* and the inheritance tax to which the same are liable under the laws of Hawaii."

That was the only question before the Supreme Court in the *Dillingham* case and how it can be twisted into a reversal or modification of the decision in the *Brown* case is beyond the comprehension of the writer.

THERE IS NO MANIFEST ERROR IN THE DECISION IN THE BROWN CASE AND THE RULE OF CONSTRUCTION OF A LOCAL LAW IS APPLICABLE.

In view of the fact that the Brown case was decided four years ago, that there have been three sessions of the local legislature since the date of that decision, and that under statutes identical with the Hawaiian statute the Courts of final jurisdiction in the States of Georgia and New York have rendered similar decisions, it cannot be said that the decision of the local Supreme Court is so manifestly erroneous as to render the rule of construction of a local law inapplicable.

In the case entitled *Territory of Hawaii vs. Hutchinson Sugar Co.*, 272 Fed. 856, at 859, this Court said:

“We consider the decision of the Supreme Court of the Territory in the case at bar a final determination of the law of the Territory which is binding on this Court.”

SECOND QUESTION:

Did the devise and bequests to the Executors and Trustees, according to the terms and conditions of the trust, constitute a taxable transfer under the Hawaiian Statute?

It must be remembered and the point cannot be too strongly emphasized that, as pointed out in the analysis of the will, the “devotion” to the charitable purposes of the property transferred by the will to the trustees is at all times subject (a) to the fulfillment of the requirements upon the estate as set forth in paragraphs numbered 1 to 7 of the analysis and (b) to the decision

of the executors and trustees to devote either the excess or the whole income of the estate "to any business enterprise which they may approve."

It is therefore clear that the income of the estate may never be devoted to the charitable purpose for the reason that the said requirements upon the estate may never be fulfilled and for the further reason that the executors and trustees may decide to devote the excess or the whole income to new business enterprises of which they may approve.

There is therefore no duty imposed on the Trustees to devote the property transferred or the income thereof to the charitable purpose referred to in the will. In the exercise of their uncontrolled discretion they may devote a part of the income to the charity and a part to secular uses, or they may devote the entire income to secular uses.

The right of the "charity" referred to in the will to enjoy the income from the property is dependent therefore, entirely upon a contingency or condition and may be entirely "defeated" or "abridged" by the act of the trustees.

THE HAWAIIAN STATUTE IS CONTROLLING IN THIS CASE.

It seems entirely clear that the case comes squarely within the purview of Act 223, S. L. 1917, the last paragraph of section one of which provides in part as follows:

"When property passes as provided herein in trust
* * * and the rights, interest or estates of the donees

are dependent upon contingencies or conditions whereby they may be wholly or in part * * * defeated, * * * or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this Act, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred."

The attempted devotion of this property to a charitable purpose may be entirely defeated or abridged by the act of the Trustees and the foregoing provision of the local statute plainly provides that where such contingencies or conditions exist the tax shall be imposed upon said transfer at the highest rate which would be possible upon the happening of any such contingency or condition. Let us assume that the Trustees, immediately upon the death of the testator and the probate of the will, had publicly announced their decision to regard the wishes of the testator as to the foundation of the educational purpose as an idealistic dream and to devote the whole income of the estate to other business enterprises without regard to the educational purpose and had by other acts evidenced their intention to maintain the "commercial character" of the estate.

If this situation existed and was made manifest to the taxing authorities in Hawaii at the time when the question of the assessment of an inheritance tax on this estate was before them can there be any doubt but that a tax would be legally assessable?

And this contingency may actually arise in the future.

It is respectfully submitted that the section of the Hawaiian Statute quoted above specifically covers this point and that the tax was rightfully assessed on the entire transfer to the Trustees.

THE DEFINITION OF THE WORD "DEVOTED" AS APPLIED BY THE TERRITORIAL SUPREME COURT IS SUPPORTED BY AUTHORITY.

The Supreme Court of the Territory based its decision largely on the dictionary meaning of the word "devoted" and that theory is supported by the cases.

A very interesting case on this point is that of *In re Duncan's Estate* (Wash.) 193 Pac. 694.

The testator in that case made certain bequests to trustees for charitable purposes one of which was as follows:

"I also declare that twenty thousand dollars (\$20,000.00) of such funds shall be invested separately, and the income thereof shall constitute a fund to be known as the 'Benevolent Fund'. My trustees, at their absolute discretion, may make from this benevolent fund grants or contributions to members of the Mission of the Christian Church at Metlakahla, Alaska, or elsewhere, in cases of distress and misfortune which may render them helpless or incapable of proper self-support.

"If at any time my trustees shall consider that the need or desirability of such grants from the benevolent fund has ceased, then the twenty thousand dollars (\$20,000.00) and the income thereof may be merged into the general fund."

The question arose as to whether this and other transfers effected by the will were taxable transfers.

The statute of the State of Washington exempting bequests for charitable purposes is much narrower than the statute in Hawaii and it was decided that the other bequests were not such charitable purposes as were contemplated by the statute. But the bequest set forth in the provision of the will above quoted was admittedly within the purview of the Washington statute. The Supreme Court of Washington, however, held that the transfer was taxable because discretion was vested in the Trustees to devote the income of the fund to other purposes.

The Court on page 697 of the decision said:

“There is a provision in the will which sets aside \$20,000 to be invested separately, the income from which shall constitute a benevolent fund, to be used by the trustees in their discretion for the relief of the distressed, unfortunate, and helpless, and though the principal sum is not to be consumed in charity, still we might hold it exempt from the tax but for the further provision that the trustees in their discretion may at any time determine that the need or desirability of such a fund has ceased, in which event the principal sum and the income therefrom shall be merged with the remainder of the estate. It is quite apparent from the record that the testator believed that the income from this fund would suffice to carry on the charitable work which he had been performing in the years immediately preceding the making of his will, such as distributing food to those who were without, and making advances to those who had met with misfortune, and this is added evidence that the main bequest is not charitable in the statutory sense. We have sought for some way to avoid a diminution of this fund but since it is wholly within the discretion of the trustees to divert the fund as and when they see fit, and when so diverted it must be treated as the

remainder of the estate, we see no escape from the conclusion that if to do good in this case we should lay down the rule that the fund is not taxable, we would thereby open a way by which the unprincipled might in all cases avoid the tax entirely."

A somewhat similar case is that of *Alfred University vs. Hancock*, 60 N. J. Eq. 470, 46 Alt. 178.

The New Jersey act provided for an exemption to "any bible or tract society, or religious institution, boards of a church, or organization thereof."

Alfred University was a university with a "theological department" together with other academic and collegiate departments. The testator left the residue of his estate to Alfred University and it was claimed that the transfer was not taxable under the statute upon the ground that the university was a religious institution, but the New Jersey Court in denying the claim of exemption said:

"Alfred University is, of course, not a bible or tract society. Nor can it be regarded as a religious institution. It is true, it has a theological department, which is an adjunct of the principal departments of the institution, which are academic and collegiate. If the theological department is to be regarded as religious, the two others are purely secular. An institution of such blended secular and religious qualities can in no sense be classed as a religious institution."

While the New Jersey case was not specifically decided on a dictionary meaning of the word devoted, it is authority for the proposition that the exemption cannot be claimed when there is a commingling of the charitable purposes with secular purposes, and that the fund must be wholly devoted to the charitable purpose

as announced by the Supreme Court of Hawaii in this case.

The use of the word "devoted" as applied to a claim of exemption from property taxation was construed in the case of *Grand Lodge of Masons vs. City of Burlington*, 84 Vt. 202, 78 Alt. 973.

In that case the Masons had constructed a Temple in the City of Burlington and the Lodge had by resolution provided that the income derived from the building should be applied first, to the payment of the debt thereon and, second, after the payment of the debt the income should be set apart into a fund for the purpose of securing a Masonic Home and for charitable uses "and that it be used for such purposes and such purposes only, forever."

"It was the claim of the plaintiff that said property was not taxable because it came within the provisions of the statute relating to the exemption of property from taxation because it was property 'devoted' to charitable uses."

The word "devoted" as used in the claim of exemption was not used in the statute but the Court said:

"But as the word 'devoted' as there used fairly means 'set apart' it is taken that the plaintiff claimed below that the property is sequestered in the sense of being set apart for charitable uses. We assume without deciding that the expenditure of the net income from the rent * * * for the purposes named in the resolution would be a charitable use of it within the meaning of the statute. But the time for such expenditure has not come and will not come until the Temple is paid for * * *. The mere intention to use the net income from the rent at some uncertain future

time, before the arrival of which the intention may be changed and the fund devoted to another and entirely different purpose is not a use of the property for charitable uses within the meaning of the statute."

THE PROPERTY OF THE ESTATE MAY NEVER VEST IN THE TRUSTEE FOR THE CHARITABLE PURPOSE.

Counsel for plaintiff-in-error on page 9 of their brief say that "the only private purpose that could by any possibility be implied" is where the trustees are empowered to accumulate sufficient land and capital for the introduction of Northern immigrant races. A rather lukewarm suggestion is made that this immigration proposition is a charitable purpose but in this statement they entirely ignore the provision of the will which makes the initiation of the educational scheme entirely subject for all time to the decision of the trustees to devote the entire income of the estate to any business enterprises of which they may approve. Is it any wonder that the Supreme Court of Hawaii said that the property and income of the Estate was "not devoted to the educational purpose in the sense in which the statute contemplates it should be."

It is true as stated in plaintiffs' brief, page 21, that the title to the property has vested in the trustees. But for what purpose? Can it be definitely now said that it has vested in them for a charitable purpose? We think not.

THE CASE OF LUNLALILO TRUSTEES VS. HAALILIO DISTINGUISHED.

The case of *Lunalilo Trustees vs. Haalilio*, 8 Haw. 640, is clearly distinguishable from this one. In that case the provisions of the will left nothing to the discretion of the trustees so far as the use to which the fund could be put was concerned. The trustees were directed to sell all of the real estate and to invest the proceeds until the total sum in the hands of the trustees should amount to \$25,000.00 at which time the trustees were *ordered* to purchase land and erect a building thereon "for the use and accommodation of poor destitute and infirm people of Hawaiian blood or extraction." In that case the trust imposed was definite and certain both as to time, amount and purpose and as to those features of the trust left nothing to the discretion of the trustees. In this case the trust imposed, if it can be said that any charitable trust is imposed at all, is indefinite and uncertain both as to time and amount and may be entirely defeated by the Trustees' decision to devote the entire income of the estate to other business enterprises.

Federal Estate Tax:

It is admitted in the stipulation (Record 2) that there is a Federal estate tax chargeable against the estate in approximately the sum of \$92,623.17.

The Federal law provides for a deduction from the value of the gross estate of "the amount of all bequests, legacies, etc.—to a trustee or trustees exclusively for

such religious, charitable, scientific, literary or educational purposes."

The only theory upon which the Federal tax could be levied is upon the theory that the devises and bequests to the trustees in this case were not *exclusively* for charitable or educational purposes, which was exactly the theory upon which the Supreme Court of Hawaii decided the same devises and bequests to be taxable under the Hawaiian statute.

It is respectfully submitted that the judgment of the Supreme Court of the Territory of Hawaii should be affirmed.

Honolulu, Hawaii, April 26, 1922.

HARRY IRWIN, Attorney General
of Hawaii, Attorney for Terri-
tory of Hawaii,
Defendant-in-Error.

ACKNOWLEDGMENT OF SERVICE:

Due service of a copy of the foregoing brief is hereby acknowledged, this 27th day of April, 1922.

ROBERTSON & CASTLE,
Attorneys for Plaintiffs-in-Error.

FREAR, PROSSER, ANDERSON &
MARX, Attorneys for HAROLD
K. L. CASTLE, Defendant-in-
Error.

No. 3833

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM R. CASTLE, LORRIN A. THURSTON
and ALFRED L. CASTLE, trustees under the
will of James Bicknell Castle,

Plaintiffs in Error,

VS.

HAROLD K. L. CASTLE and the TERRITORY OF
HAWAII,

Defendants in Error.

PETITION FOR A REHEARING ON BEHALF OF
PLAINTIFFS IN ERROR.

A. G. M. ROBERTSON,

ALFRED L. CASTLE,

W. A. GREENWELL,

ARTHUR WITHINGTON,

A. L. CHICKERING,

Merchants Exchange Building, San Francisco,

*Attorneys for Plaintiffs in Error
and Petitioners.*

FILED

JUN 24 1912

U. S. DEPARTMENT OF JUSTICE

No. 3833

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM R. CASTLE, LORRIN A. THURSTON
and ALFRED L. CASTLE, trustees under the
will of James Bicknell Castle,

Plaintiffs in Error,

VS.

HAROLD K. L. CASTLE and the TERRITORY OF
HAWAII,

Defendants in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

And now come William R. Castle, Lorrin A. Thurston and Alfred L. Castle, trustees under the will of James Bicknell Castle, plaintiffs in error, and respectfully petition this court for a rehearing of the above entitled cause because of alleged errors in the opinion of the court.

I.

This court decided the appeal upon a ground not argued by either party nor suggested in any way by the opinion of the court below. There has been no claim in any of the proceedings that the trustees received an absolute gift for their own benefit, under the will of James Bicknell Castle. The court says,

“There can be but one transmission of property by a testator and that is the one made by will, and, when, as in this case, it is made to trustees who take the *legal and equitable title* * * * the trustees become the other party to the succession and the taxable transfer becomes complete.”

What the plaintiffs in error now ask is in reality not a rehearing but an original hearing upon this question, averring that they never claimed and do not now claim a personal right in three hundred thousand dollars' worth of property.

II.

This court seems to have based its decision that there was no clear error to call for the overruling of the territorial court upon a question of local law because of its conclusion that the gift to the trustees was a gift to them absolutely not as trustees but as individuals to take both the legal and equitable estate. It is respectfully suggested that the trustees took as trustees for two purposes; one

to pay an annuity to the son, and the other to establish an educational charity; that these are two separate and distinct gifts and their values are agreed upon by the stipulation. It is respectfully suggested that the only way they can be merged is by holding the charity void whereby there would be a resulting trust for the son's benefit. If there was a trust created it was necessary for this court to pass upon its validity, which, apparently, has not been done. It is urged that a discretion for accumulation does not make a charity void, which was decided in *Inglis v. Sailors' Snug Harbor*, 3 Peters, 99, and that in the case of *St. Paul's Church v. Attorney General*, 164 Mass. 188-204, in which the counsel were Richard Olney and John C. Gray, the court said and decided:

“We are of opinion that the proper course is to hold that the limits of accumulation for the benefit of a charity are subject to the order of a court of equity.”

Gray on Perpetuities, Secs. 678, 679.

It is also decided in an opinion by Judge Devens, *Burbank v. Burbank*, 152 Mass. 254, that for any such purpose the attorney general may act and see that the trustee exercises a proper discretion.

III.

The court below failed to pass upon the question whether the amount of the tax was correct, as it says in its opinion that the only questions before

it were whether the annuity and the remainder were taxable. It is respectfully suggested that unless the apparent view of this court is adopted—that there was an absolute gift of property to the trustees as individuals (which question has not been argued)—that all trust estates in the territory will be subject to a tax at the maximum rate irrespective of who the beneficiaries are or who the trustees are, as in this case one of the named trustees is the son who if he took either individually or in trust under the law of the territory, ought not to be taxed at $6\frac{1}{2}\%$ but at 3% .

IV.

It is respectfully suggested that all personal property given by will is held in trust by the executor of the will and if the contention is upheld that it is the trustee and not the beneficiary who is the successor to the property, then all personal property passing by will should be taxed upon the amount passing to the executor who is a trustee. It is strongly but respectfully urged that there is no case in the books where trustees are held to be successors under an inheritance tax law so as to determine the rate of taxation. The only purpose for which they are regarded as successors is to make them liable for the tax, which in this case has never been disputed.

Wherefore the plaintiffs in error petition for a rehearing of the appeal.

Dated, San Francisco,
June 28, 1922.

WILLIAM R. CASTLE,
LORRIN A. THURSTON,
ALFRED L. CASTLE,
*Trustees under the Will of James
Bicknell Castle,*
A. G. M. ROBERTSON,
ALFRED L. CASTLE,
W. A. GREENWELL,
ARTHUR WITHINGTON,
A. L. CHICKERING,
*Attorneys for Plaintiffs in Error
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
June 28, 1922.

A. L. CHICKERING,
*Of Counsel for Plaintiffs in Error
and Petitioners.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD DONLAN and BEN W. HENDERSON,
Copartners, Doing Business Under the Firm
Name and Style of DONLAN and HENDER-
SON,

Appellants,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-
PANY, a Corporation, of Jackson County,
Missouri,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Montana.

FILED
1911-1-1022
K. O. MONCKTON

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD DONLAN and BEN W. HENDERSON,
Copartners, Doing Business Under the Firm
Name and Style of DONLAN and HENDER-
SON,

Appellants,

VS.

TURNER, DENNIS & LOWRY LUMBER COM-
PANY, a Corporation, of Jackson County,
Missouri,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Montana.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Solicitors of Record.

HARRY H. PARSONS, Esq., of Missoula, Montana,

A. J. VIOLETTE, Esq., of Missoula, Montana,
Messrs. GUNN, RASCH & HALL, of Helena, Montana,

Solicitors for Plaintiffs and Appellants.

Messrs. HALL & POPE, of Missoula, Montana,
REES TURPIN, Esq., of Kansas City, Missouri,
Solicitors for Defendant and Appellee.

[1*]

In the District Court of the United States in and
for the District of Montana.

No. 892.

EDWARD DONLAN and BEN W. HENDER-
SON, Copartners Doing Business Under the
Firm Name and Style of DONLAN AND
HENDERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER
COMPANY, a Corporation of Jackson
County, Missouri,

Defendant.

BE IT REMEMBERED, that on February 16th,
1921, the plaintiffs filed their complaint herein,
which complaint is in the words and figures fol-
lowing, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript
of Record.

In the District Court of the United States for the
District of Montana.

EDWARD DONLAN and BEN W. HENDER-
SON, Copartners Doing Business Under the
Firm Name and Style of DONLAN AND
HENDERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER
COMPANY, a Corporation of Jackson
County, Missouri,

Defendant.

Complaint.

Come now the plaintiffs and for cause of action
herein against the defendant, complain and allege:

1.

That at all of the times herein mentioned the
plaintiffs were copartners in the business of deal-
ing in manufacturing and selling lumber in the
Counties of Flathead and Missoula, in this State,
and doing business under the firm name and style
of Donlan and Henderson.

2.

That at all of the times herein mentioned the
defendant was, and still is, a corporation of the
State of Missouri, which was at all of said times,
and still is operating and doing business in this
State, and engaged in handling, shipping and
selling lumber in said counties.

3.

That the plaintiffs herein, between the 16th day of April, 1920, and the fifth (5th) day of August, 1920, sold and delivered to the defendant lumber of the reasonable, actual and market value of One Hundred and Forty-nine Thousand Four Hundred and Forty-seven and 22/100 (\$149,447.22) Dollars; that defendant received, accepted and took possession of said lumber; that defendant promised and agreed to pay the said reasonable price of, and for said lumber within a reasonable time from and after said delivery and acceptance. [3].

4.

That said reasonable time has now elapsed, the said sum and purchase price of said lumber is now due and owing, and is wholly unpaid save and except in the sum of Eighty-nine Thousand Four Hundred and Forty-seven and 24/100 (\$89,447.24) Dollars, thereby leaving a balance, due, owing and unpaid from the defendant to plaintiffs of Sixty Thousand (\$60,000.00) Dollars; that demand has been made therefor and payment has been and still is refused.

5.

WHEREFORE, plaintiffs pray judgment against the defendant for the sum of Sixty Thousand (\$60,000.00) Dollars, together with interest thereon at the rate of eight (8%) per cent per annum until paid.

COUNT NUMBER TWO.

Plaintiffs herein for a further, separate and second cause of action against the defendant, complains and alleges:

1.

That at all of the times herein mentioned the plaintiffs were copartners in the business of dealing in manufacturing and selling lumber in the counties of Flathead and Missoula, in this State, and doing business under the firm name and style of Donlan and Henderson. . .

2.

That at all of the times herein mentioned the defendant was, and still is, a corporation of the State of Missouri, which was at all of said times, and still is operating and doing business in this State, and engaged in handling, shipping and selling lumber in said counties.

3.

That the plaintiffs herein, between the 16th day of April, 1920, and the fifth (5th) day of August, 1920, sold and delivered to the defendant lumber of the reasonable, actual and market value of One [4] Hundred and Forty-nine Thousand Four Hundred and Forty-seven and 22/100 (\$149,447.22) Dollars; that the defendant received, accepted and took possession of said lumber; that defendant promised and agreed to pay the said reasonable price of, and for said lumber within a reasonable time from and after said delivery and acceptance.

4.

That said reasonable time has now elapsed, and said sum and purchase price of said lumber is now due and owing, and is wholly unpaid save and except in the sum of Eighty-nine Thousand Four Hundred Forty-seven and 24/100 (\$89,447.24) Dol-

lars, thereby leaving a balance due, owing and unpaid from the defendant to plaintiffs of Sixty Thousand (\$60,000.00) Dollars; that demand has been made therefor and payment has been and still is refused.

5.

That as aforesaid, defendant is a foreign corporation doing business in this State and engaged in buying lumber in Montana, and in shipping it to other States; that it has no property or assets within this State, save and except the said lumber so bought and unshipped.

That at this time the defendant possesses, and has at a certain yard, at Fletcher Spur, in Flathead County, near Pablo, Missoula County, Montana, One Million Six Hundred and Fifteen Thousand Seven Hundred and Eighty-six (1,615,786) feet of lumber stacked and piled near the said Spur, and marked, or stenciled as follows, to wit: Turner, Dennis and Lowry Lumber Company; that the said lumber is ready for sale or shipment and can, and may be taken and shipped out of this State, by the defendant, or some purchaser of the defendant, at any time to the damage and injury of these plaintiffs as herein alleged.

6.

That the said lumber is the only property of the defendant within the State of Montana, plaintiffs state on information and belief, and within the jurisdiction of this Court, out of which these plaintiffs can obtain payment and satisfaction of the said amount so due them as [5] aforesaid; that

it is the purpose, intention and object of the defendant to sell and dispose of, and ship and take said lumber out of this State, so that these plaintiffs will have no security for, or means of satisfying their said claim, or any judgment they may recover in this action. That if defendant be permitted to dispose of its said lumber, or to ship it out of this state, the plaintiffs herein will sustain and suffer a great wrong, damage and injury and be without means of satisfying, or property of the defendant with which to satisfy their said claim or any judgment recovered by them herein against defendant.

7.

That by reason of the premises plaintiffs state on information and belief that they are entitled, upon giving bond in a sum fixed and approved by the Court, to a writ of sequestration for the seizure, holding and retention of said property pending this suit and action, and until its final determination, and until the further order of this Court.

WHEREFORE, plaintiffs pray decree and order of this Court:

1st. That defendant pay to the plaintiffs the said sum of Sixty Thousand (\$60,000.00) Dollars;

2d. That the said lumber be sequestered and possession thereof held to abide the result of this action or suit; and

3d. For such order, further or different relief as plaintiffs shall be entitled to.

COUNT NUMBER THREE.

Plaintiffs herein for a further, separate and third

cause of action against the defendant, complain and allege:

1.

That at all of the times herein mentioned the plaintiffs were copartners in the business of dealing in manufacturing and selling [6] lumber in the counties of Flathead and Missoula, in this State, and doing business under the firm name and style of Donlan and Henderson.

2.

That at all of the times herein mentioned the defendant was, and still is, a corporation of the State of Missouri, which was at all of the said times, and still is operating and doing business in this State, and engaged in handling, shipping and selling lumber in said counties.

3.

That on or about the —— day of October, 1920, the plaintiffs herein, at the special instance and request of the defendant, loaned and delivered to the defendant for its use and benefit the sum of Sixty Thousand (\$60,000.00) Dollars, which said sum and amount was accepted and used by the defendant; that the said sum is now due, owing and unpaid; that demand has been made for payment thereof and payment has been and is by the defendant refused.

4.

That there is now due, owing and unpaid from this defendant to the plaintiff the said sum of Sixty Thousand (\$60,000.00) Dollars together with

interest thereon at the rate of eight (8%) per cent per annum from date until paid.

WHEREFORE, plaintiffs pray judgment against the defendant for said sum of Sixty Thousand (\$60,000.00) Dollars, with all legal interest, on this count of their complaint.

COUNT NUMBER FOUR.

Plaintiffs herein for a further, separate and fourth cause of action against the defendant, complain and allege:

1.

That at all of the times herein mentioned the plaintiffs were copartners in the business of dealing in manufacturing and selling [7] lumber in the counties of Flathead and Missoula, in this state, and doing business under the firm name and style of Donlan and Henderson.

2.

That at all of the times herein mentioned the defendant was, and still is, a corporation of the State of Missouri, which was at all of the said times, and still is operating and doing business in this State, and engaged in handling, shipping and selling lumber in said counties.

3.

That on the 16th day of April, 1920, the plaintiffs and defendant made and entered into a contract by and under the terms of which the plaintiffs, as vendors, agreed to sell and deliver to the defendant, as vendee, all of the lumber then owned by the plaintiffs in their sawmill yard at Fletcher Spur, near Pablo, in Flathead County, Montana, and also

all lumber to be thereafter sawed, cut and manufactured by the plaintiffs at such place of operations up to the first (1st) day of January, 1921, and the defendant covenanted and agreed to purchase and buy said lumber; that a copy of said contract is attached hereto, filed herewith, made a part hereof as though incorporated at this place and marked Exhibit "A."

4.

That under and by virtue of the provisions and terms of said contract—Exhibit "A"—the defendant promised and agreed to pay and advance to the plaintiffs the sum of Twenty (\$20.00) Dollars on or before the 10th day of each month, during the life of said contract, on each and every thousand feet of lumber manufactured, piled and stacked at the said spur, upon which payment the title and possession of said lumber should be that of the defendant; that on the 10th day of November, 1920, the plaintiffs had manufactured, piled and stacked in the yard and at the spur designated in said contract Six Hundred and [8] Ninety-nine Thousand Nine Hundred and Seventy-two (699,972) feet of lumber under and in performance of said contract; that defendant received a bill of sale for the same and all thereof from the plaintiffs, but refused and declined to pay said advance of Twenty (\$20.00) Dollars, or any other sum thereon, thereby and because thereof depriving the plaintiffs of the use and benefit of said money in their said logging and lumbering business and operations.

5.

That on the said 10th day of November, 1920, there became due, from the defendant to the plaintiffs, under and by virtue of said contract the sum of Thirteen Thousand Nine Hundred and Ninety-nine and 44/100 (\$13,999.44) Dollars, which amount defendant promised and agreed to pay, but which amount it wholly and fully failed to pay; that the same is now over due and wholly unpaid; that demand has been made therefor, and payment has been and is still refused; that the amount now due thereon, from the defendant to the plaintiffs is the said sum of Thirteen Thousand Nine Hundred and Ninety-nine and 44/100 (\$13,999.44) Dollars, together with interest at the rate of eight (8%) per cent per annum thereon from the said 10th day of November, 1920, until paid.

WHEREFORE, plaintiffs pray judgment on this count of their complaint against the defendant for the said sum of Thirteen Thousand Nine Hundred and Ninety-nine and 44/100 (\$13,999.44) Dollars, together with interest at the legal right until paid.

COUNT NUMBER FIVE.

Plaintiffs herein for a further, separate and fifth cause of action against the defendant complain and allege:

1.

That at all of the times herein mentioned the plaintiffs were copartners in the business of dealing in manufacturing and selling lumber in the counties of Flathead and Missoula, in this State,

and doing business under the firm name and style of Donlan and Henderson. [9]

2.

That at all of the times herein mentioned the defendant was, and still is, a corporation of the State of Missouri, which was at all of the said times, and still is operating and doing business in this State, and engaged in handling, shipping and selling lumber in said counties.

3.

That on the 16th day of April, 1920, the plaintiffs and defendant made and entered into a contract by and under the terms of which the plaintiffs, as vendors, agreed to sell and deliver to the defendant, as vendee, all of the lumber then owned by the plaintiffs in their sawmill yard at Fletcher Spur, near Pablo, in Flathead County, Montana, and also all lumber to be thereafter sawed, cut and manufactured by the plaintiffs at such place of operations up to the first (1st) day of January, 1921, and the defendant covenanted and agreed to purchase and buy said lumber; that a copy of said contract is attached hereto, filed herewith, made a part hereof as though incorporated at this place and marked Exhibit "A."

4.

That under and by virtue of the provisions and terms of said contract—Exhibit "A"—the defendant promised and agreed to pay and advance to the plaintiffs the sum of Twenty (\$20.00) Dollars on or before the 10th day of each month, during the life of said contract, on each and every thousand

feet of lumber manufactured, piled and stacked at the said Spur, upon which payment the title and possession of said lumber should be that of the defendant; that on the 10th day of November, 1920, the plaintiffs had manufactured, piled and stacked in the yard and at the spur designated in said contract Six Hundred and Ninety-nine Thousand Nine Hundred and Seventy-two (699,972) feet of lumber under and in [10] performance of said contract; that defendant received a bill of sale for the same and all thereof from the plaintiffs, but refused and declined to pay said advance of Twenty (\$20.00) Dollars, or any other sum thereon, thereby and because thereof depriving the plaintiffs of the use and benefit of said money in their said logging and lumbering business and operations.

5.

That after said default and breach of contract by the defendant, these plaintiffs for a period continued their said sawing, manufacturing and lumbering operations at said place; that by the 20th day of November, 1920, they had sawed, in addition to the lumber mentioned in paragraph "4" hereof, about one million (1,000,000) feet of lumber and had stacked and piled the same in said yard at spur. That defendant did not on or prior to the 10th day of December, or at any other time accept and advance on said one million (1,000,000) feet of lumber, the said sum of Twenty (\$20.00) Dollars per thousand feet, or any other sum whatsoever or at all.

6.

That defendant well knew that plaintiffs were dependent upon said monthly payments in order to sustain themselves, continue said business and operations; and on information and belief the plaintiffs state that said payments were refused by defendant for the purpose and object, and with the intention and design to so cripple and injure these plaintiffs that they must perforce close their said business and close said lumbering and manufacturing operations.

7.

That defendant thus and otherwise breached and violated its said contract, and thereby and because thereof made it impossible for plaintiffs to continue their said manufacturing and logging operations under said contract from and after the 20th day of November, 1920, to January 1st, 1921, as contemplated by said contract, on account of lack of [11] funds and money so caused by said defaults; that had the defendant not so breached its said contract the plaintiffs would have continued said operations until January 1st, 1921, would have turned and manufactured and delivered about one million additional feet of lumber under said contract, Exhibit "A," and have thereby made a net profit, save for said defaults of defendant, of Fifteen (\$15,000.00) Thousand Dollars.

8.

That by reason of the premises, and on account of said wrongful acts of the defendant the plaintiffs have been and are, they state on information

and belief, damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

WHEREFORE, plaintiffs pray judgment on this count of their complaint for the sum of Fifteen Thousand (\$15,000.00) Dollars damages, and on all counts for costs and all proper relief.

(Signed) A. J. VIOLETTE and
 HARRY H. PARSONS,

Attorneys for Plaintiffs. [12]

State of Montana,

County of Missoula,—ss.

Ben W. Henderson, being first duly sworn, upon his oath deposes and says: That he is a member of the copartnership firm of Donlan and Henderson, and as such has a right and authority to make this verification; that he has read the above and foregoing complaint, knows the contents thereof, and it is true of his own knowledge, save as to those matters stated on information and belief as to which he believes it true, and that this verification is made for, and on behalf of the said copartnership firm of Donlan and Henderson.

(Signed) BEN W. HENDERSON.

Subscribed and sworn to before me this 17th day of December, 1920.

[Seal] (Signed) HARRY H. PARSONS,
Notary Public for the State of Montana, Residing
 at Missoula, Montana.

My commission expires February 18th, 1922.

(1) 8062. Filed Dec. 20, 1920. H. M. Rawn,
Clerk. By P. H. Gerber, Deputy. [13]

Exhibit "A."

CONTRACT OF SALE.

THIS AGREEMENT, made, in triplicate, this 16th day of April, 1920, by and between DONLAN & HENDERSON, a copartnership, of Pablo, Missoula County, Montana, hereinafter called the vendors, and TURNER, DENNIS & LOWRY LUMBER COMPANY, a corporation of Jackson County, Missouri, hereinafter called the vendees.

WITNESSETH.

That said vendors, for and in consideration of the payments, covenants and agreements, to be made, kept and performed by said vendees as hereinafter contained and specified, do hereby agree to sell and deliver to the vendees, and the vendees hereby agree to buy, "All of the lumber now owned by the vendors in pile at the their sawmill yard at Fletcher Spur, near Pablo, Flathead County, Montana, and all lumber to be sawed, cut and manufactured by them at such Fletcher Spur sawmill hereafter until the 1st day of January, 1921.

And it is hereby mutually agreed and understood by and between the parties hereto, as follows, to wit:

1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per thousand feet on all lumber hereby sold and in pile at Fletcher Spur, in accordance with an inventory this day agreed upon; that the vendees shall also loan to the vendors hereon the sum of \$20,000.00, which shall be evidenced by a promissory note of the vendors, and which shall bear interest at the rate of seven per cent per annum from this date until paid as herein-

after specified; and that the vendees shall also pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be hereafter sawed, cut and manufactured by the vendors under and during the terms of this contract, which payment shall be made monthly, based upon an inventory of finished piles in the mill yard taken on or before the 10th day of each month, providing, however, that \$10.00 per thousand feet of such advancement shall be applied and credited on the \$20,000.00 promissory note above [14] mentioned, until the principal and interest thereof is fully paid. That the advancement this day made shall bear interest at the rate of seven per cent (7%) per annum from this date, and all other advancements to be made as herein specified shall also bear interest at the same rate from and after the date the same are made and until paid; and such interest shall be computed and adjusted monthly, on or about the 10th day of each month, based upon the balance thereof remaining against the vendors, after deducting such advancements from the sale price on all shipments made, as hereinafter provided.

2. That the vendors shall manufacture and grade said lumber according to the Western Pine Manufacturers Association grading rules and standards, and shall protect and hold the vendees harmless against any claim or loss which may arise under said rules or standard.

3. That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees.

4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced on said lumber *has* hereinbefore provided, which draft the vendees agree to honor and pay when presented.

5. That upon the payment of the advance of \$20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the [15] vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and bill of sale given.

6. That in the event of a failure on the part of the vendors to carry out this contract, the right is hereby given to the vendees to use the planer of the vendors at said Fletcher Spur to dress the said

lumber in order to protect themselves against loss on account of the amounts advanced hereunder.

7. That the vendors hereby lease to the vendees for and during the life of this contract the land upon which said lumber-yard is or may be located at said Fletcher Spur, but the vendors may retain the right to occupy and use the same for the purposes of this contract.

8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the loss thereon to be made payable to the vendees.

9. That this contract and every provision thereof shall extend to and be binding upon the successors and assigns of the respective parties hereto.

In witness whereof, the said parties have hereunto set their hands and seals this 16th day of April, 1920.

DONLAN & HENDERSON,

By BEN W. HENDERSON.

TURNER, DENNIS & LOWRY LUMBER
COMPANY,

By THOS. S. DENNIS,

Secy. & Treas.

Attest: _____,

Secretary.

Filed Feb. 16, 1921. C. R. Garlow, Clerk U. S.
District Court, District of Montana. [16]

That on June 7th, 1921, amended answer was duly filed herein, in the words and figures following, to wit: [17]

In the District Court of the United States for the
District of Montana.

EDWARD DONLAN and BEN W. HENDER-
SON, Copartners Doing Business Under the
Firm Name and Style of DONLAN AND
HENDERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER
COMPANY, a Corporation of Jackson
County, Missouri,

Defendants.

Amended Answer.

Comes now the defendant and for its amended answer to plaintiffs' complaint:

I.

Admits the allegations of paragraph I of plaintiffs' first alleged cause of action.

II.

Admits that the defendant was and still is a corporation of the State of Missouri.

III.

Denies generally all of the allegations of said alleged first cause of action not herein specifically admitted or denied.

IV.

Admits the allegations of paragraph I of plaintiffs' second alleged cause of action.

V.

Admits that the defendant was and still is a corporation of the State of Missouri.

VI.

Denies generally all of the allegations of said alleged second cause of action not herein specifically admitted or denied. [18]

VII.

Admits the allegations of paragraph I of plaintiffs' third alleged cause of action.

VIII.

Admits that the defendant was and still is a corporation of the State of Missouri.

IX.

Denies generally all of the allegations of said alleged third cause of action not herein specifically admitted or denied.

X.

Admits the allegations of paragraph I of plaintiffs' fourth alleged cause of action.

XI.

Admits that the defendant was and still is a corporation of the State of Missouri.

XII.

Defendant admits that on the 16th day of April, 1920, the plaintiffs and defendant executed the instrument described as Exhibit "A" attached to plaintiffs' complaint and that the said Exhibit "A"

so attached to plaintiffs' complaint is a true copy of said instrument.

Defendant admits that on the 10th day of November, 1920, the plaintiffs had manufactured, piled and stacked in the yard and at the spur referred to in plaintiffs' complaint 699,972 feet of lumber and that it received a bill of sale for the same.

XIII.

Denies generally all of the allegations of said alleged fourth cause of action not herein specifically admitted or denied.

XIV.

Admits the allegations of paragraph I of plaintiffs' fifth alleged cause of action.

XV.

Admits that the defendant was and still is a corporation [19] of the State of Missouri.

XVI.

Defendant admits that on the 16th day of April, 1920, the plaintiffs and defendant executed the instrument described as Exhibit "A" attached to plaintiffs' complaint and that the said Exhibit "A" so attached to plaintiffs' complaint is a true copy of said instrument.

Defendant admits that on the 10th day of November, 1920, the plaintiffs had manufactured, piled and stacked in the yard and at the spur referred to in plaintiffs' complaint 699,972 feet of lumber and that it received a bill of sale for the same.

XVII.

Denies generally all of the allegations of said al-

leged fifth cause of action not herein specifically admitted or denied.

XVIII.

For further and separate answer to the first and second counts of the plaintiffs' complaint, this defendant alleges and says:

That if the lumber referred to in said first and second counts of plaintiffs' complaint, or any part thereof, be or was the lumber destroyed by fire at Pablo, Montana, on the 3d day of August, 1920, this defendant alleges that said lumber was, prior to said 3d day of August, 1920, caused by the plaintiffs' to be insured against loss by fire for the benefit of and to secure the parties hereto and such interests therein as they may have had, and that subsequent to the said 3d day of August, 1920, and after the destruction of said lumber by fire, and prior to the commencement of this action, the plaintiffs received from the insurers of said property and lumber on account of the said policies of insurance the sum of \$70,000, being an amount in excess of the amount sued for in said first and second counts of said complaint, and that by reason thereof, if any amount was ever owned by the defendant to the plaintiffs, which defendant denies, the same has been fully paid, satisfied and discharged by [20] reason of the receipt of the proceeds of said insurance policies as aforesaid, and that said sum, so received as aforesaid, was received by plaintiffs for and on behalf of the defendant and that defendant is entitled, in law and in equity, to have the said

sum applied to a liquidation of the accounts between the parties hereto.

COUNTERCLAIM.

For further answer and by way of counterclaim defendant alleges, and for first cause of action says:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri with its principal place of business in Kansas City in said state.

II.

That at all times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That on or about the 16th day of April, 1920, the plaintiffs, for a valuable consideration, made, executed and delivered to the defendant their promissory note in the sum of \$10,000, payable four months after date to the order of the defendant, with interest thereon from the date thereof at the rate of seven per cent per annum. Said note provided further that in case of suit to recover thereon a reasonable attorney's fee to be fixed and allowed by the Court should be taxed and collected as a part of the costs of action.

IV.

That the said note was and is in the words and figures following, to wit: [21]

“\$10,000.00 Missoula, Montana, April 16, 1920.

On or before Four Months after date, for value received we or either of us promise to pay Turner, Dennis & Lowry Co. or order the sum of Ten Thousand Dollars with interest thereon at the rate of seven per cent per annum from date until paid. (In case of suit to recover hereon a reasonable attorneys fee to be fixed and allowed by the court shall be taxed and collected as a part of the costs of the action.)

Payable at —.

No. —.

Due 8/16.

DONLAN & HENDERSON.

BEN W. HENDERSON.

E. DONLAN.”

V.

That the defendant is now the owner and holder of said note and was the owner and holder thereof at the time of the commencement of this action; that said note has not been paid nor any part thereof, save and except the sum of \$3,235.27 paid thereon on the 3d day of August, 1920; that demand for the payment of the balance due on said note has been made upon the plaintiffs by the defendant prior to the commencement of this action, and payment has been by the plaintiffs and each of them refused, and there is now due and owing thereon from the plaintiffs and each of them to the defend-

ant herein the sum of \$6,974.73 together with interest thereon at the rate of seven per cent per annum from the 3d day of August, 1920.

VI.

That the sum of \$750 is a reasonable attorney's fee to be fixed and allowed by the Court to the defendant and to be taxed and collected as a part of the costs of action herein.

WHEREFORE defendant prays judgment against the plaintiffs and each of them on this its first cause of action for the sum of \$6,974.73 together with interest thereon at the rate of seven per cent per annum from the 3d day of August, 1920; for the sum of \$750 to be fixed and allowed by the Court as attorney's fees as provided in said note and for its costs herein expended.

For further answer to plaintiffs' complaint and by way of counterclaim and as a second cause of action against the plaintiffs, defendant alleges:
[22]

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

II.

That at all times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm

name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That on or about the 28th day of June, 1920, the plaintiffs, for a valuable consideration, made, executed and delivered to the defendant their promissory note in the sum of \$6,082.24, payable September 1st, 1920, to the order of the defendant, with interest thereon at the rate of eight per cent per annum from date until paid, interest payable semi-annually. Said note further provided that in case of default in the payment of the same that plaintiffs would pay to the defendant, or the holder of said note, a reasonable attorney's fee to be fixed and determined by the Court.

IV.

That the following is a copy of said note, to wit:
"\$6082.24 Missoula, Montana, June 28th, 1920.

On September 1st, 1920, after date, I, we, or either of us, promise to pay to Turner, Dennis & Lowry Lumber Co., or order, the sum of Six Thousand and Eighty-two and 24/100 Dollars For Value received, payable at Missoula Trust and Savings Bank, Missoula, Montana, with interest at the rate of eight per cent per annum from date until paid; interest payable semi-annually. And further agree that in case of default in the payment of this note, principal or interest, to pay all costs and expenses of collecting the same, including reasonable attorney's fees, to be fixed and determined by the Court. Each of the makers hereof

and the endorsers hereon waive demand, protest and notice of nonpayment.

No. —.

Due —.

Address —.

DONLAN & HENDERSON,
By E. DONLAN."

V.

That the defendant is now the owner and holder of said note and was such owner and holder at the time of the commencement [23] of this action; that the said note has not been paid nor any part thereof, and there is now due and owing thereon and on account thereof from the plaintiffs and each of them to the defendant herein the sum of \$6,082.24 together with interest thereon at the rate of eight per cent per annum from the 28th day of June, 1920.

VI.

That the sum of \$750 is a reasonable attorney's fee to be fixed and allowed by the Court to the defendant and to be taxed and collected as a part of the costs of action herein.

WHEREFORE defendant prays judgment against the plaintiffs and each of them on account of this its second cause of action for the sum of \$6,082.24, together with interest thereon at the rate of eight per cent per annum from the 28th day of June, 1920; for the sum of \$750 to be fixed and allowed the defendant as attorney's fees as provided in said note and for defendants costs herein expended.

For further answer to plaintiffs' complaint and

by way of counterclaim and for a third cause of action against the plaintiffs, defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

II.

That at all times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That on or about the 28th day of June, 1920, the plaintiffs, for a valuable consideration, made, executed and delivered [24] to the defendant their promissory note in the sum of \$5,000, payable October 1st, 1920, to the order of the defendant, with interest thereon at the rate of eight per cent per annum from date until paid, interest payable semi-annually. Said note further provided that in case of default in the payment of the same that plaintiffs would pay to the defendant, or the holder of said note, a reasonable attorney's fee to be fixed and determined by the Court.

IV.

That the following is a copy of said note, to wit:

“\$5000.00 Missoula, Montana, June 28, 1920.

On October 1st, 1920, after date, I, we, or either

of us promise to pay to Turner, Dennis & Lowry Lumber Co., or order, the sum of Five Thousand Dollars for value received, payable at Missoula Trust and Savings Bank, Missoula, Montana, with interest at the rate of eight per cent per annum from date until paid; interest payable semi-annually. And further agree that in case of default in the payment of this note, principal or interest, to pay all costs and expenses of collecting the same, including reasonable attorney's fees to be fixed and determined by the Court. Each of the makers hereof and the endorsers hereon waive demand, protest and notice of nonpayment.

No. —.

Due. —.

Address. —.

DONLAN & HENDERSON,

By E. DONLAN."

V.

That the defendant is now the owner and holder of said note and was such owner and holder at the time of the commencement of this action; that the said note has not been paid not any part thereof, and there is now due and owing thereon and on account thereof from the plaintiffs and each of them to the defendant herein the sum of \$5,000 together with interest thereon at the rate of eight per cent per annum from the 28th day of June, 1920.

VI.

That the sum of \$500 is a reasonable attorney's fee to be fixed and allowed by the Court to the defend-

ant and to be taxed and collected as a part of the costs of action herein.

WHEREFORE DEFENDANT PRAYS JUDGMENT AGAINST THE PLAINTIFFS and each of them on account of this its third cause of action for [25] the sum of \$5,000 together with interest thereon at the rate of eight per cent per annum from the 28th day of June, 1920; for the sum of \$500 to be fixed and allowed the defendant as attorney's fees as provided in said note and for defendant's costs herein expended.

COUNT NUMBER FOUR.

For further answer to plaintiffs' complaint and by way of counterclaim and as a fourth cause of action against the plaintiffs, defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

II.

That at all the times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and residents and citizens of the State of Montana.

III.

That on or about the 15th day of April, 1920, the plaintiffs and defendant entered into a contract or agreement, whereby defendant agreed to

lend the plaintiffs the sum of \$20,000, for which sum plaintiffs agreed to give to the defendant their notes, and defendant agreed to advance and lend to the plaintiffs certain sums of money to be determined, loaned and computed as follows, to wit: Defendant agreed to advance and lend to the plaintiffs at the time of the making of said contract a sum equal to \$20.00 per thousand feet on all the lumber then owned by the plaintiffs in pile at plaintiffs' sawmill yard at Fletcher's Spur near Pablo, Flathead County, Montana, and defendant agreed to advance and lend to the plaintiffs on or before the 10th day of each month thereafter during [26] the life of said contract a sum equal to \$20.00 per thousand feet on all lumber sawed, cut and manufactured by the plaintiffs after the date of the said contract and prior to the 10th day of each succeeding month during the life of said contract, said loans and advancements to be based upon an inventory of finished piles of lumber in said mill yard, which inventory was to be taken on or before the 10th day of each succeeding month during the life of said contract. That it was further provided by the said contract that as security for the loans and advancements so to be made by the defendant as aforesaid, the plaintiffs would give to the defendant at the time of each of said loans and advancements bills of sale describing the lumber on account of which the respective advances and loans were made, it being the intention of the parties thereby to give and receive said bills of sale as security and as evidence of a factor's lien. That it was further

provided in said contract that one-half of the loans or advances upon lumber to be thereafter manufactured should be applied by the parties in payment of the said notes for \$20,000 until such time as said notes should be paid in full, and it was agreed under and by the terms of said contract that the defendant should market and sell said lumber for and on account of the plaintiffs at the highest market prices obtainable at the times of making such sales and that the proceeds of said sales should be paid to the plaintiffs after deducting from the price at which said sales were made the necessary freight and railroad charges, a trade discount of two per cent, a commission of fifteen per cent to be paid to or deducted by the defendant for the defendant's services in making said sales, and the sum of \$20.00 per thousand feet loaned or advanced by defendant on account of the said lumber as provided is said contract.

It was further provided by said contract that the said sums of \$20.00 per thousand feet upon said lumber should be repaid to the defendant out of sales of said lumber to be made in the [27] manner aforesaid and plaintiffs agreed to pay the defendant interest upon said loans and advances at the rate of seven per cent per annum.

That is was further agreed by the said contract that all of said loans so to be made by the defendant to the plaintiffs herein should bear interest at the rate of seven per cent per annum from and after the date the said loans should be made until paid, and it was further agreed that the plaintiffs

should deliver said lumber f. o. b. cars at said Fletcher's Spur, and should dress the same, if required, as the defendant should direct and order and at such times as defendant should direct and order in order that defendant might be enabled to sell said lumber for and on behalf of the plaintiffs.

Said contract further provided that the plaintiffs would, at their own expense, cause all of said lumber manufactured by them or to be manufactured by them as aforesaid to be insured and to be kept insured at all times against loss by fire for the sum of \$25.00 per thousand feet, the loss thereon to be made payable to the defendant. That said contract further provided and it was by and through said contract agreed between the parties thereto that in the event that any of said lumber should be lost or destroyed by fire at any time after defendant should have loaned or advanced money thereon, then and in that event, said insurance of \$25.00 per thousand feet of said lumber so destroyed should be paid to the defendant in liquidation of its loss and damage on account of the advances made upon said lumber, and on account of the loss and damage which defendant would in that event suffer by reason of the trouble and expense to which defendant would have been put in the performance of the said contract with reference to the lumber so destroyed by fire and on account of the loss and damage which defendant would suffer in that event by reason of defendant's inability to collect or procure its commission for the sale of the lumber so destroyed by fire. [28]

IV.

That thereafter, and on the same day, the plaintiffs and defendant entered upon the performance of said contract and duly made the loans and advancements agreed to be made by defendant at the time of the making of said contract, and on said 15th day of April, 1921, the defendant, in performance of the said agreement, loaned to the plaintiffs a sum equal to \$20.00 per thousand feet on all the lumber then owned by the plaintiffs in pile at plaintiffs' sawmill yard at said Fletcher's Spur. That thereafter and on the 16th day of April, 1920, the plaintiffs and defendant, for the purpose and with the intention of making a written memorandum of their said agreement theretofore made as hereinbefore alleged, and for the purpose of putting said contract and agreement in writing, executed an instrument in the words and figures following, to wit:

"CONTRACT OF SALE.

THIS AGREEMENT, made, in triplicate, this 16th day of April, 1920, by and between DONLAN & HENDERSON, a copartnership, of Pablo, Missoula County, Montana, hereinafter called the vendors, and TURNER, DENNIS & LOWRY LUMBER COMPANY, a corporation of Jackson County, Missouri, hereinafter called the vendees.

WITNESSETH.

That said vendors, for and in consideration of the payments, covenants and agreements, to be made, kept and performed by said vendees as hereinafter contained and specified, do hereby agree to

sell and deliver to the vendees, and the vendees hereby agree to buy, 'All of the lumber now owned by the vendors in pile at their sawmill yard at Fletcher Spur, near Pablo, Flathead County, Montana, and all lumber to be sawed, cut and manufactured by them at such Fletcher Spur sawmill hereafter until the 1st day of January, 1921. And it is hereby mutually agreed and understood by and between the parties hereto, as follows, to wit:

1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per thousand feet on all lumber hereby sold and in pile at Fletcher Spur, in accordance with an inventory this day agreed upon; that the vendees shall also loan to the vendors hereon the sum of \$20,000.00, which shall be evidenced by a promissory note of the vendors, and which shall bear interest at the rate of seven per cent per annum from this date until paid as hereinafter specified; and that the vendees shall also pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be hereafter sawed, cut and manufactured by the vendors under and during the terms of this contract, which payment shall be made made monthly, based upon an inventory of finished piles in the millyard taken on or before the [29] 10th day of each month, PROVIDING, however, that \$10.00 per thousand feet of such advancement shall be applied and credited on the \$20,000.00 promissory note above mentioned, until the principal and interest thereof is fully paid. That the advance-

ment this day made shall bear interest at the rate of seven per cent (7%) per annum from this date, and all other advancements to be made as herein specified shall also bear interest at the same rate from and after the date the same are made and until paid; and such interest shall be computed and adjusted monthly, on or about the 10th day of each month, based upon the balance thereof remaining against the vendors, after deducting such advancements from the sale price on all shipments made, as hereinafter provided.

2. That the vendors shall manufacture and grade said lumber according to the Western Pine Manufacturers Association grading rules and standards, and shall protect and hold the vendees harmless against any claim or loss which may arise under said rules or standard.

3. That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees.

4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15% less 2% trade discount, and less \$20.00 per thousand feet already

paid and advanced on said lumber as hereinbefore provided, which draft the vendees agree to honor and pay when presented.

5. That upon the payment of the advance of \$20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designed as the property of the vendees, from the time it is so marked and bill of sale given.

6. That in the event of a failure on the part of the vendors to carry out this contract, the right is hereby given to the vendees to use the planer of the vendors at said Fletcher Spur to dress the said lumber in order to protect themselves against loss on account of the amounts advanced hereunder.

7. That the vendors hereby lease to the vendees for and during the life of this contract the land upon which said lumber yard is or may be located at said Fletcher Spur, but the vendors may retain the right to occupy and use the same for the purpose of this contract.

8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the

loss thereon to be made payable to the vendees.

9. That this contract and every provision thereof shall extend to and be binding upon the successors and assigns of the respective parties hereto.

In Witness Whereof, the said parties have hereunto set their hands and seals this 16th day of April, 1920. [30]

DONLAN AND HENDERSON.

By BEN W. HENDERSON.

TURNER, DENNIS & LOWRY LUMBER
COMPANY.

By THOS. S. DENNIS,

Secy. & Treas.

Attest: _____

Secretary."

V.

That said written instrument was drawn by the plaintiffs' attorney and that the words and language used therein was chosen and selected by him. That after making and entering into said contract, the parties hereto proceeded to carry out said agreement according to their understanding thereof, and that at all times and at the time of the making of said agreement and at all times subsequent thereto, the parties thereto understood and intended the said contract to be and provide as alleged in paragraph III hereof, and understood and intended the said contract to be a contract providing for loans to be made by defendant to plaintiffs and for the sale of lumber by defendant on behalf of plaintiffs, for a factor's commission of fifteen per cent, and understood and intended that the

plaintiffs should pay the defendant interest upon the amounts so loaned to the plaintiffs and that plaintiffs should cause said lumber to be insured for the sum of \$25.00 per thousand feet thereof, the loss thereon to be made payable to the defendant, and that such sum should be paid to the defendant in liquidation of its loss and damage on account of the loans and advancements made upon said lumber and its services performed in connection with said contract in the event that any of said lumber should be destroyed by fire. That it was understood and intended by the parties thereto at all of said times that the risk of loss by fire of said lumber should not be upon the defendant and the parties thereto at all times acted upon, treated, understood and interpreted and by their conduct practically construed said contract as having the force and effect hereinafter alleged and set out.

VI.

That thereafter plaintiffs and defendant entered upon [31] the performance of the said contract and agreement and defendant duly performed all of the conditions of said contract on its part to be performed and on the date of said contract, defendant loaned to the plaintiffs the sum of \$40,000 on account of 2,000,000 feet of lumber then on hand, manufactured and piled in the said sawmill yard and that thereafter and prior to the 3d day of August, 1920, the plaintiffs sawed, cut and manufactured at said sawmill 1,338,412 additional feet of lumber pursuant to the terms of said contract, and

prior to and upon the said 3d day of August, 1920, defendant advanced and loaned to the plaintiffs upon said additional feet of lumber in the manner provided in said contract the sum of \$20.00 per thousand feet. That from said 2,000,000 feet and said 1,338,412 feet of lumber hereinbefore referred to, plaintiffs shipped eleven car loads of lumber containing 322,474 feet of lumber, and said lumber so shipped was sold by the defendant pursuant to the terms of said contract for and on account of the plaintiffs and the proceeds of said sale were applied as provided in said contract to the payment of a trade discount of two per cent, a commission of fifteen per cent to the defendant for its services in making said sale, to the repayment to defendant of \$20.00 per thousand feet of said lumber so shipped as aforesaid on account of the said sums so previously advanced upon said lumber by the defendant and the remainder of the sale price was duly paid to the plaintiffs by crediting the same to plaintiffs' account as stated in paragraph IX hereof, and that the remainder of said 2,000,000 feet and 1,338,412 feet of lumber over and above the quantity so shipped as aforesaid, that is to say, 3,015,938 feet of lumber was piled at the said sawmill yard on the said 3d day of August, 1920, and at said time and on said date defendant had loaned and advanced to the plaintiffs the sum of \$20.00 per thousand feet upon all of said 3,015,938 feet of lumber. [32]

VII.

That by reason of the premises and under the

terms of said contract it was then on said date the duty of the plaintiffs to keep said quantity of lumber insured against loss by fire for \$25.00 per thousand feet, the loss thereon to be made payable to the defendant. That on said date the plaintiffs had insured said lumber for the sum of \$70,000, the loss thereon having been made payable to the plaintiffs or the defendant as their interests might appear, and plaintiffs had insured said lumber for the further sum of \$60,000 against loss by fire, the loss thereon being made payable to the plaintiffs alone and on said date no other insurance against loss by fire had been procured upon the said quantity of lumber.

VIII.

That on said 3d day of August, 1920, said 3,015,938 feet of lumber was destroyed by fire and that by reason thereof the defendant became immediately entitled under the terms of said contract to have and receive in liquidation of its loss and damage thereby suffered the sum of \$25.00 per thousand feet upon the said 3,015,938 feet of lumber so destroyed as aforesaid. That on or about the 1st day of October, 1920, the plaintiffs collected the sum of \$70,000 as insurance paid for the loss of said lumber, and thereafter and on or about the 1st day of November, 1920, plaintiffs collected the further sum of \$60,000 as insurance on account of the loss of said lumber as aforesaid, and that by reason of the premises it was then the duty of the plaintiffs at the time the said respective sums were received to pay to the defendant the

sum of \$25.00 per thousand feet upon said 3,015,938 feet of lumber, that is to say, the sum of \$75,398.45; but that said sum has not been paid nor any part thereof, save and except the sum of \$60,000 paid to the defendant by the plaintiffs on the 2d day of October, 1920, and there still remains due and owing to the defendant from the plaintiffs on account of the money collected from insurance upon said lumber as [33] aforesaid, the sum of \$15,398.45, together with interest thereon at the rate of eight per cent per annum from the 1st day of November, 1920, less the sum of \$13,999.44 credited to plaintiffs by the defendant as hereinafter alleged.

IX.

That subsequent to the said 3d day of August, 1920, defendant continued to perform its obligations under the said contract and duly performed all of the conditions of said contract on its part to be performed and that subsequent to the 3d day of August, 1920, and prior to the 8th day of November, 1920, the plaintiffs cut, sawed and manufactured 1,615,786 feet of lumber under the terms of said contract and defendant loaned and advanced to the plaintiffs upon the said lumber the sum of \$20.00 per thousand feet thereof, which loans and advances were made as follows, to wit: The sum of \$10,289.-98 was loaned on the 2d day of September, 1920, on account of 514,499 feet of lumber, the sum of \$8,-026.30 was loaned on the 30th day of September, 1920, on 401,315 feet of lumber, the sum of \$13,999.-44 was loaned on the 8th day of November, 1920,

on 699,972 feet of lumber by defendant's then crediting to the plaintiffs that sum of money as a payment upon the said sum of \$15,398.45 then due the defendant from the plaintiffs as stated in paragraph VIII hereof, and defendant, at the time of making and allowing said credit, notified the plaintiffs that said credit had been made.

X.

That plaintiffs are entitled to credits upon the said amounts so due as aforesaid by reason of the remainder or balance received upon the purchase price of the eleven carloads of lumber referred to in paragraph VI hereof, and that the remainders or balances so received and credited to plaintiffs by the defendant, and the dates of the same, were as follows: On the 16th day of September, 1920, the sum of \$1,159.19; on the 21st day of September, 1920, the sum of \$414.45; on the 5th day of November, 1920, the sum of \$518.36 [34] and on the 22d day of December, 1920, the sum of \$257.64. That no sums whatever other than the sums above stated have been paid defendant upon plaintiffs' said account and indebtedness.

XI.

That prior to and at the time of the commencement of this action the plaintiffs caused said 1,615,786 feet of lumber to be taken possession of by the sheriff of Flathead County, Montana, and wrongfully caused the same to be attached and seized, thereby rendering it impossible for the plaintiffs to perform their said contract or to ship or consign the said lumber so that defendant might sell the

same on account of the plaintiffs, and rendered the performance of said contract by the parties hereto wholly impossible, by reason of which it became and is impossible for the defendant to sell said lumber and to procure reimbursement for the loan of \$20.00 per thousand feet upon said lumber, and on account thereof the said sum of \$20.00 per thousand feet upon all of said 1,615,786 feet of lumber became immediately due and payable from the plaintiffs to the defendant, together with interest thereon at the rate of seven per cent per annum from the dates of the respective loans and advances hereinbefore alleged and set out, and the plaintiffs are and were at the time of the commencement of this action indebted to the defendant on account of the premises in the sum of \$31,891.03, together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920.

WHEREFORE, defendant prays judgment against the plaintiffs and each of them upon this its fourth cause of action for the sum of \$31,891.03 together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920, and for defendant's costs herein expended.
[35]

COUNT NUMBER FIVE.

For further answer to plaintiffs' complaint and by way of counterclaim and as a fifth cause of action against the plaintiffs, defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and exist-

ing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said State.

II.

That at all the times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That between the 15th day of April, 1920, and the 8th day of November, 1920, the defendant loaned to the plaintiffs, at plaintiffs' special instance and request, the sum of \$99,083.96 at the times and in the amounts following, to wit: \$40,000 on the 15th day of April, 1920; \$17,835.52 on the 28th day of June, 1920; \$8,932.72 on the 3d day of August, 1920; \$10,289.98 on the 2d day of September, 1920; \$8,026.30 on the 30th day of September, 1920, and \$13,999.44 on the 8th day of November, 1920, which sums and each and all of them the plaintiffs promised to repay to defendant within a reasonable time, with interest on each of said sums from the dates loaned at the rate of seven per cent per annum. That said reasonable time has now elapsed and had so elapsed prior to the commencement of this action, and after said reasonable time had elapsed and before the commencement of this action, the defendant duly demanded payment of the same from the plaintiffs, but that said sum or sums have not been paid nor any part thereof, save and except

the sum of \$420.96 paid on the 29th day of June, 1920, the sum of \$511.94 and [36] the sum of \$558.76 paid on the 1st day of July, 1920, the sum of \$525.38 and the sum of \$570.20 paid on the 10th day of July, 1920, the sum of \$738.74 and the sum of \$685.44 paid on the 12th day of July, 1920, the sum of \$553.98 paid on the 30th day of July, 1920, the sum of \$544 paid on the 1st day of August, 1920, the sum of \$553.18 paid on the 3d day of August, 1920, the sum of \$786.90 paid on the 12th day of August, 1920, the sum of \$585.18 and the sum of \$251.19 and the sum of \$322.82 paid on the 16th day of September, 1920, the sum of \$209.13 and the sum of \$205.32 paid on the 21st day of September, 1920, the sum of \$60,000 paid on the 2d day of October, 1920, the sum of \$518.36 paid on the 5th day of November, 1920, and the sum of \$257.64 paid on the 22d day of December, 1920. That interest should be computed upon the amounts so loaned as aforesaid at the rate of seven per cent per annum from the dates the respective sums were loaned as aforesaid and that a computation of the interest due and owing and the amounts paid prior to the said 22d day of December, 1920, shows that there was due the defendant from the plaintiffs on said date on account of the premises the sum of \$32,224.72.

WHEREFORE, defendant prays judgment against the plaintiffs and each of them upon this its fifth cause of action for the sum of \$32,224.72, together with interest thereon at the rate of seven

per cent per annum from the 22d day of December, 1920, and for defendant's costs herein expended.

COUNT NUMBER SIX.

For further answer to plaintiffs' complaint and by way of counterclaim and as a sixth cause of action against the plaintiffs, defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue [37] of the laws of the State of Missouri, with its principal place of business in Kansas City in said State.

II.

That at all of the times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That at various times between the 16th day of April, 1920, and the 3d day of August, 1920, plaintiffs borrowed from the defendant and defendant loaned to plaintiffs certain sums of money, which loans were secured by certain lumber owned by and manufactured by the plaintiffs up to and including the said 3d day of August, 1920, and that on said 3d day of August, 1920, a certain portion of said lumber was destroyed by fire, and by reason thereof plaintiffs became indebted to defendant on account of certain insurance upon the said lumber, and that at various times between the 16th day of

April, 1920, and the 2d day of October, 1920, plaintiffs made various payments upon the loans and indebtedness hereinbefore referred to. That thereafter and on or about the 3d day of October, 1920, an account was stated between the plaintiffs and defendant as an account stated upon all of the said dealings between the plaintiffs and the defendant relating to said loans made by defendant to plaintiffs up to and including the said 3d day of August, 1920, and relating to the said lumber so lost by fire on said date, upon which statement a balance was found to be due from the plaintiffs to the defendant of \$36,329.43, which sum the plaintiffs then and there promised to pay to the defendant.

IV.

That plaintiffs have not paid the same nor any part thereof and there is now due and owing to the defendant from the plaintiffs on account of the premises the sum of \$36,329.43, together with [38] interest thereon at the rate of eight per cent per annum from the 3d day of October, 1920.

WHEREFORE, defendant prays judgment against the plaintiffs and each of them on this defendant's sixth cause of action for the sum of \$36,329.43, together with interest thereon at the rate of eight per cent per annum from the 3d day of October, 1920, and for defendant's costs herein expended.

COUNT NUMBER SEVEN.

For further answer to plaintiffs' complaint and by way of counterclaim and as a seventh cause of action against the plaintiffs, defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

II.

That at all the times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That on the 1st day of October, 1920, at Missoula, Montana, the plaintiffs received from Firemans Fund Fire Insurance Company and Palatine Insurance Company and American Insurance Company the sum of \$10,000, to and for the use of the defendant, and thereafter and on or about the 1st day of November, 1920, the plaintiffs received from the Inter Insurance Exchange the sum of \$60,000.00 to and for the use of the plaintiffs.

IV.

That thereafter and prior to the commencement of this action the defendant demanded payment of the said sum so received by the plaintiffs for the use of the defendant, but that the said sum [39] has not been paid nor any part thereof, and there is now due and owing to the defendant from the plaintiffs the sum of \$16,398.45, together with interest upon \$10,000 thereof at the rate of eight

per cent per annum from the 1st day of October, 1920, and with interest upon \$5,398.45 thereof at the rate of eight per cent per annum from the 1st day of November, 1920.

Wherefore, defendant prays judgment against the plaintiffs and each of them upon this, defendant's seventh cause of action for the sum of \$15,398.45 together with interest upon \$10,000 thereof at the rate of eight per cent per annum from the 1st day of October, 1920, and interest upon \$5,398.45 thereof at the rate of eight per cent per annum from the 1st day of November, 1920, together with defendant's costs herein expended.

COUNT NUMBER EIGHT.

For further answer to plaintiffs' complaint and by way of counterclaim and as an eighth cause of action against the plaintiffs, defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

II.

That at all times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That on or about the 15th day of April, 1920, the

plaintiffs and defendant entered into a contract or agreement, whereby defendant agreed to lend the plaintiffs the sum of \$20,000, for which sum plaintiffs agreed to give to the defendant their notes, and defendant agreed to advance and lend to the plaintiffs certain [40] sums of money to be determined, loaned and computed as follows, to wit: Defendant agreed to advance and lend to the plaintiffs at the time of the making of said contract a sum equal to \$20.00 per thousand feet on all the lumber then owned by the plaintiffs in pile at plaintiffs' sawmill yard at Fletcher's Spur, near Pablo, Flathead County, Montana, and defendant agreed to advance and lend to the plaintiffs on or before the 10th day of each month thereafter during the life of said contract a sum equal to \$20.00 per thousand feet on all lumber sawed, cut and manufactured by the plaintiffs after the date of the said contract and prior to the 10th day of each succeeding month during the life of said contract, said loans and advancements to be based upon an inventory of finished piles of lumber in said mill yard, which inventory was to be taken on or before the 10th day of each succeeding month during the life of said contract. That it was further provided by the said contract that as security for the loans and advancements so to be made by the defendant as aforesaid, the plaintiffs would give to the defendant at the time of each of said loans and advancements bills of sale describing the lumber on account of which the respective advances and loans were made, it being the intention of the parties thereby to give and receive said bills

of sale as security, and as evidence of a factor's lien. That it was further provided in said contract that one-half of the loans or advancements upon lumber to be thereafter manufactured should be applied by the parties in payment of the said notes for \$20,000 until such time as said notes should be paid in full, and it was agreed under and by the terms of said contract that the defendant should market and sell said lumber for and on account of the plaintiffs at the highest market prices obtainable at the times of making such sales and that the proceeds of said sales should be paid to the plaintiffs after deducting from the price at which said sales were made the necessary freight and railroad charges, at trade discount of two per cent, a commission of [41] fifteen per cent to be paid to or deducted by the defendant for the defendant's services in making said sales, and the sum of \$20.00 per thousand feet loaned or advanced by defendant on account of the said lumber as provided in said contract.

It was further provided by said contract that the said sums of \$20.00 per thousand feet upon said lumber should be repaid to the defendant out of sales of said lumber to be made in the manner aforesaid and plaintiffs agreed to pay the defendant interest upon said loans and advances at the rate of seven per cent per annum.

That it was further agreed by the said contract that all of said loans so to be made by the defendant to the plaintiffs herein should bear interest at the rate of seven per cent per annum

from and after the date the said loans should be made until paid, and it was further agreed that the plaintiffs should deliver said lumber f. o. b. cars at said Fletcher's Spur, and should dress the same, if required, as the defendant should direct and order in order that defendant might be enabled to sell said lumber for and on behalf of the plaintiffs.

Said contract further provided that the plaintiffs would, at their own expense, cause all of said lumber manufactured by them or to be manufactured by them as aforesaid to be insured and to be kept insured at all times against loss by fire for the sum of \$25.00 per thousand feet, the loss thereon to be made payable to the defendant.

IV.

That thereafter, and on the same day, the plaintiffs and defendant entered upon the performance of said contract and duly made the loans and advancements agreed to be made by defendant at the time of the making of said contract, and on said 15th day of April, 1921, the defendant, in performance of the said agreement, loaned to the plaintiffs a sum equal to \$20.00 per thousand feet [42] on all the lumber then owned by the plaintiffs in pile at plaintiffs' sawmill yard at said Fletcher Spur. That thereafter and on the 16th day of April, 1920, the plaintiffs and defendant, for the purpose and with the intention of making a written memorandum of their said agreement theretofore made as hereinbefore alleged, and for the purpose of putting said contract and agreement in writing, exe-

cuted an instrument in the words and figures following, to wit:

“CONTRACT OF SALE.

THIS AGREEMENT, made, in triplicate, this 16th day of April, 1920, by and between Donlan and Henderson, a copartnership, of Pablo, Missoula County, Montana, hereinafter called the vendors, and Turner, Dennis & Lowry Lumber Company, a corporation of Jackson County, Missouri, hereinafter called the vendees.

WITNESSETH.

That said vendors, for and in consideration of the payments, covenants and agreements, to be made, kept and performed by said vendees as hereinafter contained and specified, do hereby agree to sell and deliver to the vendees, and the vendees hereby agree to buy, All of the lumber now owned by the vendors in pile at their sawmill yard at Fletcher Spur, near Pablo, Flathead County, Montana, and all lumber to be sawed, cut and manufactured by them at such Fletcher Spur sawmill hereafter until the 1st day of January, 1921.

And it is hereby mutually agreed and understood by and between the parties hereto, as follows, to wit:

1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per thousand feet on all lumber hereby sold and in pile at Fletcher Spur, in accordance with an inventory this day agreed upon; that the vendees shall also loan to the vendors hereon the sum of \$20,000.00 which shall be

evidenced by a promissory note of the vendors, and which shall bear interest at the rate of seven per cent per annum from this date until paid as hereinafter specified; and that the vendees shall also pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be hereafter sawed, cut and manufactured by the vendors under and during the terms of this contract, which payment shall be made monthly, based upon an inventory the finished piles in the mill yard taken on or before the 10th day of each month, PROVIDING, however, that \$10.00 per thousand feet of such advancement shall be applied and credited on the \$20,000.00 promissory note above mentioned, until the principal and interest thereof is fully paid. That the advancement this day made shall bear interest at the rate of seven (7%) per cent per annum from this date, and all other advancements to be made as herein specified shall also bear interest at the same rate from and after the date the same are made and until paid; and such interest shall be computed and adjusted monthly, on or about the 10th day of each month, based upon the balance thereof remaining against the vendors, after deducting such advancements from the sale price on all shipments made, as hereinafter provided.

2. That the vendors shall manufacture and grade said [43] lumber according to the Western Pine Manufacturers Association grading rules and standards, and shall protect and hold the vendees harmless against any claim or loss which may arise under said rules or standards.

3. That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees.

4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced on said lumber as hereinbefore provided, which draft the vendees agree to honor and pay when presented.

5. That upon the payment of the advance of \$20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and bill of sale given.

6. That in the event of a failure on the part of

the vendors to carry out this contract, the right is hereby given to the vendees to use the planer of the vendors at said Fletcher Spur to dress the said lumber in order to protect themselves against loss on account of the amounts advanced hereunder.

7. That the vendors hereby lease to the vendees for and during the life of this contract the land upon which said lumber yard is or may be located at said Fletcher Spur, but the vendors may retain the right to occupy and use the same for the purpose of this contract.

8. That the vendor shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the loss thereon to be made payable to the vendees.

9. That this contract and every provision thereof shall extend to and be binding upon the successors and assigns of the respective parties hereto.

In Witness Whereof, the said parties have hereunto set their hands and seals this 16th day of April, 1920.

DONLAN AND HENDERSON.

By BEN W. HENDERSON.

TURNER, DENNIS & LOWRY LUMBER
COMPANY.

By THOS. S. DENNIS,
Secretary and Treasurer.

Attest: _____

Secretary."

V.

That said written instrument was drawn by the plaintiffs' attorney and that the words and language used therein was chosen and selected by him. That after making and entering into said contract, the parties hereto proceeded to carry out said agreement according to their understanding thereof, and that at all times and at the time of the making of said agreement and at all times subsequent thereto, the parties thereto understood and intended the said contract to be and provide as alleged in paragraph III hereof, and understood and intended the said contract to be a contract providing for loans to be made by defendant to plaintiffs and for the sale of lumber by defendant on behalf of plaintiffs for a factor's commission of fifteen per cent, and understood and intended that the plaintiffs should pay the defendant interest upon the amounts so loaned to the plaintiffs and that plaintiffs should cause said lumber to be insured for the sum of \$25.00 per thousand feet thereof, the loss thereon to be made payable to the defendant. That it was understood and intended by the parties thereto at all of said times that the risk of loss by fire of said lumber should not be upon the defendant and the parties thereto at all times acted upon, treated, understood and interpreted and by their conduct practically construed said contract as having the force and effect hereinbefore alleged and set out.

VI.

That defendant duly performed all of the condi-

tions of said contract on its part to be performed and that after the making of said contract and on or about the date thereof, the defendant loaned to the plaintiffs the sum of \$40,000 and advanced said sum on account of 2,000,000 feet of lumber then on hand and manufactured in the said sawmill yard of the plaintiffs, which said advance and loan was made in compliance with the provisions of said contract, and that to secure said loan, the plaintiff did on the same day execute and deliver to the defendant a bill of sale describing said lumber, and said lumber was thereupon stenciled with the name of the [45] defendant. That thereafter and between the date of the said contract and the 3d day of August, 1920, the plaintiff sawed, cut and manufactured at said sawmill 1,338,412 feet of lumber pursuant to the terms of said contract, and prior to the same date the defendant advanced and loaned to the plaintiffs in the manner provided in said contract, the sum of \$20.00 per thousand feet upon said lumber so manufactured as aforesaid and as security for said loans received bills of sale therefor from the plaintiffs, and said lumber was stenciled with the name of the defendant. That the said loans and advancements so made by the defendant to the plaintiffs as aforesaid upon said 1,338,412 feet of lumber were made as follows, to wit: Defendant advanced and loaned to the plaintiffs \$17,835.52 on the 28th day of June, 1920, being an advance or loan of \$20.00 per thousand feet upon 891,776 feet of lumber; defendant advanced to plaintiffs \$8,932.72 on the 3d day of August, 1920,

being an advance or loan of \$20.00 per thousand upon 446,636 feet of lumber. That between the date of said contract and the said 3d day of August, 1920, the defendant, pursuant to the terms of said contract, sold ten cars of lumber from said sawmill yard containing 283,129 feet of lumber, for and on account of the plaintiffs, for the highest market price obtainable, and after deducting from the price received by defendant for the said ten cars of lumber the fifteen per cent commission provided for in said contract, the trade discount of two per cent, and \$20.00 per thousand feet of said lumber to repay the defendant for the amounts previously advanced upon the lumber in said cars, paid the balance to the plaintiffs by crediting the same to plaintiffs account with plaintiffs consent as hereinafter alleged.

VII.

That on the 3d day of August, 1920, and at the time of the fire hereinafter referred to, the plaintiffs saved and preserved from loss by fire one carload of lumber hereinbefore described and referred to, which carload contained 39,345 feet and that thereafter and on or about the 12 day of August, 1920, defendant sold and [46] marketed said carload of lumber for and on account of the plaintiffs in the same manner as defendant had previously marketed said ten cars of lumber hereinbefore described upon the same terms, and that by reason thereof defendant was able to and did deduct from the amount remitted to the plaintiffs the sum of \$20.00 per thousand upon 39,345 feet of lumber

in said car whereby and by reason of which the plaintiffs became and are entitled to a credit upon the said loans of \$786.90 as of the date of August 12, 1920. That the dates of shipment, the number of feet contained in each car and the amount of credit due plaintiffs on account thereof on account of the ten cars hereinbefore referred to and shipped and marketed between the date of said contract and said 3d day of August, 1920, were as follows, to wit: *One* the 29th day of June, 1920, one car containing 21,048 feet was shipped and marketed and on account thereof plaintiffs became and are entitled to a credit as of that date of \$420.96; on the 1st day of July, 1920, one car containing 25,597 feet of lumber was shipped and marketed whereby plaintiffs became and are entitled to a credit on said loans of \$511.94 as of that date; on the 1st day of July, 1920, one car containing 27,938 feet of lumber was shipped and marketed whereby plaintiffs became and are entitled to a credit upon said loans of \$558.76 as of that date; that on the 10th day of July, 1920, one car containing 26,269 feet and one car containing 28,510 feet of lumber were shipped and marketed whereby plaintiffs became and are entitled to credit upon said loans of \$525.38 and \$570.20 resuectively as of that date; that on the 12th day of July, 1920, one car containing 36,937 feet and one car containing 34,272 feet of lumber were shipped and marketed whereby plaintiffs became and are entitled to credits of \$738.74 and \$685.44 respectively as of said date; that on the 30th day of July, 1920,

one car containing 27,699 feet of lumber was shipped and marketed whereby plaintiffs became and are entitled to credit upon said loans of \$533.98 as of that date; that on the 1st day of August, 1920, one car containing [47] 27,200 feet of lumber was shipped and marketed whereby plaintiffs became and are entitled to a credit on account of said loans of \$544 as of that date; that on the 3d day of August, 1920, one car containing 27,659 feet of lumber was shipped and marketed whereby plaintiffs became and are entitled to a credit of \$553.18 upon said loans as of that date.

VIII.

That on the said 3d day of August, 1920, there remained at the said sawmill yard after the shipment of said ten cars of lumber and exclusive of the carload of lumber thereafter shipped as aforesaid on the 12th day of August, 1920, and owned by the plaintiffs and upon which the defendant had, previous to that time, advanced and loaned the plaintiffs under the terms of said contract the sum of \$20.00 per thousand feet, and the said plaintiffs were then indebted to the defendant on account of the said advances and loans of \$20.00 per thousand feet upon said lumber then remaining in said mill yard as aforesaid in the sum of \$75,398.45, together with interest thereon at the rate of seven per cent per annum from the dates the respective advances were made as aforesaid.

IX.

That on said 3d day of August, 1920, the said 3,015,938 feet of lumber was destroyed by fire and

that by reason thereof it became and was rendered impossible for the defendant to sell or market the said lumber in the manner provided by the said contract and it became impossible for the defendant to reimburse itself for the advances so made out of the sale price of said lumber and the subject matter of the said contract in so far as it related to the said 3,015,938 feet of lumber and the advances made thereon, was destroyed and by reason thereof the said sum of \$20.00 per thousand feet upon said 3,015,938 feet of lumber together with interest thereon as aforesaid became immediately due and payable from the plaintiffs to the defendant and defendant thereupon became entitled to recover the said [48] sum so advanced and loaned by them from the plaintiffs.

X.

That subsequent to the said 3d day of August, 1920, defendant continued to perform its obligations under the said contract and duly performed all of the conditions of said contract on its part to be performed and that subsequent to the 3d day of August, 1920, and prior to the 8th day of November, 1920, the plaintiffs cut, sawed and manufactured 1,615,786 feet of lumber under the terms of said contract and defendant loaned and advanced to the plaintiffs upon the said lumber the sum of \$20.00 per thousand feet thereof, which loans and advances were made as follows, to wit: The sum of \$10.-289.98 was loaned on the 2d day of September, 1920, on account of 514,499 feet of lumber, the sum of \$8,026.30 was loaned on the 30th day of Septem-

ber, 1920, on 401,315 feet of lumber, the sum of \$13,999.44 was loaned on the 8th day of November, 1920, on 699,972 feet of lumber by defendant's then crediting to the plaintiffs that sum of money as a payment upon the sums then due the defendant from the plaintiffs and defendant, at the time of making and allowing said credit, notified the plaintiffs that said credit had been made.

XI.

That plaintiffs are entitled to credit upon the said amounts so due as aforesaid by reason of the remainder or balance received upon the purchase price of the eleven carloads of lumber referred to in paragraph VI hereof, and that the remainders or balances so received and credited to plaintiffs by the defendant, and the dates of the same, were as follows: On the 16th day of September, 1920, the sum of \$1,159.19; on the 21st day of September, 1920, the sum of \$414.45; on the 5th day of November, 1920, the sum of \$518.36; and on the 22d day of December, 1920, the sum of \$257.64. That no sums whatever other than the sums above stated, have been paid defendant upon plaintiffs said account and indebtedness. [49]

XII.

That prior to and at the time of the commencement of this action the plaintiffs caused said 1,615,786 feet of lumber to be taken possession of by the sheriff of Flathead County, Montana, and wrongfully caused the same to be attached and seized, thereby rendering it impossible for the plaintiffs to perform their said contract or to ship

or consign the said lumber so that defendant might sell the same on account of the plaintiffs, and rendered the performance of said contract by the parties hereto wholly impossible, by reason of which it became and is impossible for the defendants to sell said lumber and to procure reimbursement for the loan of \$20.00 per thousand feet upon said lumber, and on account thereof the said sum of \$20.00 per thousand feet upon all of said 1,615,786 feet of lumber became immediately due and payable from the plaintiffs to the defendant together with interest thereon at the rate of seven per cent per annum from the dates of the respective loans and advances hereinbefore alleged and set out.

XIII.

That the defendant, prior to the commencement of this action demanded payment of the sums so due, as aforesaid, from the plaintiffs, and that plaintiffs have not paid said sums, or any part thereof, and by reason of the premises plaintiffs are indebted to the defendant in the sum of \$32,224.72 together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920.

WHEREFORE, defendant prays judgment against the plaintiffs and each of them, on account of this defendant's eighth cause of action, for the sum of \$32,224.72 together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920, and for defendant's costs herein expended.

COUNT NUMBER NINE.

For further answer to plaintiffs' complaint and by way of counterclaim and as a ninth cause of action against the plaintiffs, [50] defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

II.

That at all times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That on or about the 15th day of April, 1920, plaintiffs and defendant entered into the contract hereinbefore described and referred to in paragraph III and IV of Count Number Four hereof, to which reference is hereby made and which is by reference made a part hereof as if set forth at length in this paragraph.

IV.

That thereafter plaintiffs and defendant entered upon the performance of said contract and the defendant duly performed all of the conditions of said contract on defendant's part to be performed, but that the plaintiffs, disregarding their obliga-

tions under said contract, breached and failed to perform the same in the following particulars, among others, to wit:

V.

That on the 3d day of August, 1920, there was in said sawmill yard and subject to the said contract 3,015,938 feet of lumber upon which defendant had advanced and loaned to plaintiffs the sum of \$20.00 per thousand feet and that said lumber was insured against loss by fire with loss payable to the plaintiffs or defendant as their interests might appear for the sum of \$70,000 and no more, and that the plaintiffs failed, neglected and refused [51] to keep the said lumber insured against loss by fire for \$25.00 per thousand feet and failed and neglected to provide insurance against loss by fire in that amount with the loss payable to the defendant, and that the plaintiffs, contrary to the provisions of said contract, further insured said lumber against loss by fire in the sum of \$60,000 with the loss payable to the plaintiffs and to no other persons.

VI.

That the said lumber, to wit, 3,015,938 feet thereof was on said 3d day of August, 1920, totally destroyed by fire and that the insurers thereof upon the policies of insurance aforesaid paid the sum of \$130,000 on account of the said loss, \$60,000 of which sum was paid to the defendant and \$70,000 was paid to and received by the plaintiffs, and retained and appropriated by plaintiffs to their own use, and plaintiffs failed, refused and neglected

to pay the same or any part thereof to the defendant. That by reason thereof defendant was damaged in the sum of \$15,398.45.

VII.

That plaintiffs further broke and failed to perform the obligations of said contract, in that, at the time of and prior to the commencement of this action, plaintiffs had cut, sawed, manufactured and piled in their sawmill yard 1,615,786 feet of lumber under the terms of said contract and upon said lumber the defendant had, prior to the commencement of this action, advanced and loaned to the plaintiffs the sum of \$20.00 per thousand feet as provided in the said contract and agreement, and that at the time of commencing this action and prior thereto, the plaintiffs, disregarding their duty and obligation to load and ship said lumber upon the orders of the defendant, wrongfully caused all of said lumber to be seized and taken possession of by the sheriff of Flathead County, Montana, and to be attached and thereby disabled themselves from performing the obligations of said contract and thereby prevented [52] this defendant from selling and disposing of the same as provided in said contract and prevented the defendant from earning a commission of fifteen per cent upon the sale price thereof. That had it not been for the said seizure and attachment of said property as aforesaid, defendant would have been able to sell and dispose of the same for a price of \$25.00 per thousand feet and defendant would have been able to have earned a commission thereon of fifteen

per cent of said price, which would have amounted to the sum of \$6,059.20.

WHEREFORE, defendant prays judgment against the plaintiffs on this, defendant's ninth cause of action, for the sum of \$21,457.65 together with interest thereon at the rate of eight per cent per annum from the date of the commencement of this action together with the defendant's costs herein expended.

COUNT NUMBER TEN.

For further answer to plaintiffs' complaint and by way of counterclaim and as a tenth cause of action against the plaintiffs, defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

II.

That at all the times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and residents and citizens of the State of Montana.

III.

That on or about the 15th day of April, 1920, the plaintiffs and defendant entered into a contract or agreement, whereby defendant agreed to lend the plaintiffs the sum of \$20,000, for which sum plaintiffs agreed to give to the defendant their notes, [53]

and defendant agreed to advance and lend to the plaintiffs certain sums of money to be determined, loaned and computed as follows, to wit: Defendant agreed to advance and lend to the plaintiffs at the time of the making of said contract a sum equal to \$20.00 per thousand feet on all the lumber then owned by the plaintiffs in piles at plaintiffs' saw-mill yard at Fletcher's Spur near Pablo, Flathead County, Montana, and defendant agreed to advance and lend to the plaintiffs on or before the 10th day of each month thereafter during the life of said contract a sum equal to \$20.00 per thousand feet on all lumber sawed, cut and manufactured by the plaintiffs after the date of the said contract and prior to the 10th day of each succeeding month during the life of said contract, said loans and advancements to be based upon an inventory of finished piles of lumber in said mill yard, which inventory was to be taken on or before the 10th day of each succeeding month during the life of said contract. That it was further provided by the said contract that as security for the loans and advancements so to be made by the defendant as aforesaid, the plaintiffs would give to the defendant at the time of each of said loans and advancements bills of sale describing the lumber on account of which the respective advances and loans were made, it being the intention of the parties thereby to give and receive said bills of sale as security and as evidence to a factor's lien. That it was further provided in said

contract that one-half of the loans or advances upon lumber to be thereafter manufactured should be applied by the parties in payment of the said notes for \$20,000 until such time as said notes should be paid in full, and it was agreed under and by the terms of said contract that the defendant should market and sell said lumber for and on account of the plaintiffs at the highest market prices obtainable at the times of making such sales and that the proceeds of said sales should be paid to the plaintiffs after deducting from the price at which said sales were made the necessary [54] freight and railroad charges, a trade discount of two per cent, a commission of fifteen per cent to be paid to or deducted by the defendant for the defendant's services in making said sales, and the sum of \$20.00 per thousand feet loaned or advanced by defendant on account of the said lumber as provided in said contract.

It was further provided by said contract that the said sums of \$20.00 per thousand feet upon said lumber should be repaid to the defendant out of sales of said lumber to be made in the manner aforesaid and plaintiffs agreed to pay the defendant interest upon said loans and advances at the rate of seven per cent per annum.

That it was further agreed by the said contract that all of said loans so to be made by the defendant to the plaintiffs herein should bear interest at the rate of seven per cent per annum from and after the date the said loans should be made until

paid, and it was further agreed that the plaintiffs should deliver said lumber f. o. b. cars at said Fletcher's Spur, and should dress the same, if required, as the defendant should direct and order and at such times as defendant should direct and order in order that defendant might be enabled to sell said lumber for and on behalf of the plaintiffs.

Said contract further provided that the plaintiffs would, at their own expense, cause all of said lumber manufactured by them or to be manufactured by them as aforesaid to be insured and to be kept insured at all times against loss by fire for the sum of \$25.00 per thousand feet, the loss thereon to be made payable to the defendant. That said contract further provided and it was by and through said contract agreed between the parties thereto that in the event that any of said lumber should be lost or destroyed by fire at any time after defendant should have loaned or advanced money thereon, then and in that event, said insurance of \$25.00 per thousand feet of said lumber so destroyed should be paid to the defendant in liquidation of its loss and damage on account of the [55] advances made upon said lumber, and on account of the loss and damage which defendant would in that event suffer by reason of the trouble and expense to which defendant would have been put in the performance of the said contract with reference to the lumber so destroyed by fire and on account of the loss and damage which defendant would suffer in that event by reason of defendant's

inability to collect or procure its commission for the sale of lumber so destroyed by fire.

IV.

That therefore, and on the same day, the plaintiffs and defendant entered upon the performance of said contract and duly made the loans and advancements agreed to be made by defendant at the time of the making of said contract, and on said 15th day of April, 1921, the defendant, in performance of the said agreement, loaned to the plaintiffs a sum equal to \$20.00 per thousand feet on all the lumber then owned by the plaintiffs in pile at plaintiffs' sawmill yard at said Fletcher's Spur. That thereafter and on the 16th day of April, 1920, the plaintiffs and defendant, for the purpose and with the intention of making a written memorandum of their said agreement theretofore made as hereinbefore alleged, and for the purpose of putting said contract and agreement in writing, executed an instrument in the words and figures following, to wit:

“CONTRACT OF SALE.

THIS AGREEMENT, made, in triplicate, this 16th day of April, 1920, by and between DONLAN & HENDERSON, a copartnership of Pablo, Missoula County, Montana, hereinafter called the vendors, and TURNER, DENNIS & LOWRY LUMBER COMPANY, a corporation of Jackson County, Missouri, hereinafter called the vendees.

WITNESSETH.

That said vendors, for and in consideration of

the payments, covenants and agreements, to be made, kept and performed by said vendees as hereinafter contained and specified, do hereby agree to sell and deliver to the vendees, and the vendees hereby agree to buy, All of the lumber now owned by the vendors in pile at their sawmill yard at Fletcher Spur, near Pablo, Flathead County, Montana, and all lumber to be sawed, cut and manufactured by them at such Fletcher Spur sawmill hereafter until the 1st day of January, 1921.

And it is hereby mutually agreed and understood by and between the parties hereto, as follows, to wit:

1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advance-ment hereon, the sum of \$20.00 per thousand feet on all lumber hereby sold and in [56] pile at Fletcher Spur, in accordance with an inventory this day agreed upon; that the vendees shall also loan to the vendors hereon the sum of \$20,000.00, which shall be evidenced by a promissory note of the vendors, and which shall bear interest at the rate of seven per cent per annum from this date until paid as hereinafter specified; and that the vendees shall also pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be hereafter sawed, cut and manufactured by the vendors under and during the terms of this contract, which payment shall be made monthly, based upon an inventory of finished piles in the mill yard taken on or before the 10th day of each month, PROVIDED, however, that \$10.00 per thousand feet of such ad-

vancement shall be applied and credited on the \$20,000.00 promissory note above mentioned, until the principal and interest thereof is fully paid. That the advancement this day made shall bear interest at the rate of seven per cent (7%) per annum from this date, and all other advancements to be made as herein specified shall also bear interest at the same rate from and after the date the same are made and until paid; and such interest shall be computed and adjusted monthly, on or about the 10th day of each month; based upon the balance thereof remaining against the vendors, after deducting such advancements from the sale price on all shipments made, as hereinafter provided.

2. That the vendor shall manufacture and grade said lumber according to the Western Pine Manufacturers Association grading rules and standards, and shall protect and hold the vendees harmless against any claim or loss which may arise under said rules or standard.

That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees.

4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the ven-

dors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15% less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced on said lumber as hereinbefore provided, which draft the vendees agree to honor and pay when presented.

5. That upon the payment of the advance of \$20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designed as the property of the vendees, from the time it is so marked and bill of sale given.

6. That in the event of a failure on the part of the vendors to carry out this contract, the right is hereby given to the vendees to use the planer of the vendors at said Fletcher Spur to dress the said lumber in order to protect themselves against loss on account of the amounts advanced hereunder.

7. That the vendors hereby lease to the vendees for and during the life of this contract the land upon which said lumber yard is or may be located at said Fletcher Spur, but the [57] vendors may retain the right to occupy and use the

same for the purpose of this contract.

8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the loss thereon to be made payable to the vendees.

9. That this contract and every provision thereof shall extend to and be binding upon the successors and assigns of the respective parties hereto.

In Witness Whereof, the said parties have hereunto set their hands and seals this 16th day of April, 1920.

DONLAN AND HENDERSON,

By BEN W. HENDERSON.

TURNER, DENNIS & LOWRY LUMBER
COMPANY.

By THOS. S. DENNIS,

Secy. & Treas.

Attest: _____

Secretary."

V.

That it was intended by the plaintiffs and defendant in executing the said instrument hereinbefore set out, to put into written form their agreement hereinbefore described in paragraph III hereof and that at and before the making and execution of said written instrument, this defendant and the plaintiffs intended that said instrument should mean and that the legal consequences thereof should

be as set forth and described in paragraph III hereof.

That through a mutual mistake of plaintiffs and defendant, the parties to said contract hereinbefore alleged and set out, the said written instrument did not and does not truly state or express the intention of said parties and does not truly express or set out what were intended to be the legal consequences of said written contract, in this, to wit: that said instrument uses the words "vendor" and "vendee" and uses the word "sale" in the title of said instrument, and the words "sell and deliver" and the word "buy" in the second paragraph prior to the paragraph numbered 1, and the word "sold" in the first and eighth numbered paragraphs thereof, whereas it was intended by the parties to said agreement that they should be principal and factor and not vendor and vendee, and that said lumber should be delivered but not sold to the defendant, and that paragraph numbered 8 of said instrument provides that upon the payment of the advance of \$20.00 per thousand feet, the title to said lumber shall pass to the [58] defendant and become their property, whereas no such agreement or understanding was had by and between the parties thereto, and that it was intended and agreed that the plaintiffs should execute and deliver a bill of sale, of said lumber, to the defendant solely as security to secure the defendant for the amounts loaned and advanced upon the said lumber as aforesaid and as evidence of a factor's lien.

That the portions of said written instrument so improperly inserted therein as aforesaid were in-

serted therein by the attorney for the plaintiffs without instructions for either the plaintiffs or the defendant and contrary to the intention of the said parties. That the parties thereto, assuming that said attorney had so drawn said instrument as to express the real contract of the parties and that it provided the legal consequences desired by said parties, being mutually mistaken in such assumption inadvertently executed the same as aforesaid. That the parties thereto at the time of the execution of said instrument and at all times subsequent thereto have treated, acted upon and understood said agreement as alleged and set out in paragraph III hereof, and not otherwise.

That the defendant has duly performed all of the conditions of said agreement on its part to be performed and is now ready; and at all times has been ready to perform all the conditions in said contract on its part to be done and performed and that the true contract, so made and entered into by plaintiffs and defendant as aforesaid is and was in all respects just, reasonable and equitable, and the terms thereof just, adequate and fair and that defendant is entitled to have said written instrument reformed and corrected by the Court to conform to the real contract and agreement between the parties hereto as aforesaid and to this end it has no adequate remedy at law and that the amount herein in controversy in connection with the reformation of said instrument as aforesaid exceeds the sum of \$8,000, exclusive of interest and costs. [59]

VI.

That thereafter plaintiffs and defendant entered

upon the performance of the said contract and agreement and defendant duly performed all of the conditions of said contract on its part to be performed and on the date of said contract, defendant loaned to the plaintiffs the sum of \$40,000 on account of 2,000,000 feet of lumber then on hand, manufactured and piled in the said sawmill yard, and that thereafter, and prior to the 3d day of August, 1920, the plaintiffs sawed, cut and manufactured at said sawmill 1,338,412 additional feet of lumber pursuant to the terms of said contract, and prior to and upon the said 3d day of August, 1920, defendant advanced and loaned to the plaintiffs upon said additional feet of lumber in the manner provided in said contract the sum of \$20.00 per thousand feet. That from said 2,000,000 feet and said 1,338,412 feet of lumber hereinbefore referred to, plaintiffs shipped eleven carloads of lumber containing 322,474 feet of lumber, and said lumber so shipped was sold by the defendant pursuant to the terms of said contract for and on account of the plaintiffs and the proceeds of said sale were applied as provided in said contract to the payment of a trade discount of two per cent, a commission of fifteen per cent to the defendant for its services in making said sale, to the repayment to defendant of \$20.00 per thousand feet of said lumber so shipped as aforesaid on account of the said sums so previously advanced upon said lumber by the defendant and the remainder of the sale price was duly paid to the plaintiffs by crediting the same to plaintiffs' account as stated in paragraph IX hereof, and that the re-

mainder of said 2,000,000 feet and 1,338,412 feet of lumber over and above the quantity so shipped as aforesaid, that is to say, 3,015,938 feet of lumber was piled at the said sawmill yard on the said 3d day of August, 1920, and at said time and on said date defendant had loaned and advanced to the plaintiffs the sum of \$20.00 per thousand feet upon all of said 3,015,938 feet of lumber. [60]

VII.

That by reason of the premises and under the terms of said contract, it was then on said date the duty of the plaintiffs to keep said quantity of lumber insured against loss by fire for \$25.00 per thousand feet, the loss thereon to be made payable to the defendant. That on said date the plaintiffs had insured said lumber for the sum of \$70,000, the loss thereon having been made payable to the plaintiffs or the defendant as their interests might appear, and plaintiffs had insured said lumber for the further sum of \$60,000 against loss by fire, the loss thereon being made payable to the plaintiffs alone and on said date no other insurance against loss by fire had been procured upon the said quantity of lumber.

VIII.

That on said 3d day of August, 1920, said 3,015,938 feet of lumber was destroyed by fire and that by reason thereof the defendant became immediately entitled, under the terms of said contract, to have and receive in liquidation of its loss and damage thereby suffered the sum of \$25.00 per thousand feet upon the said 3,015,938 feet of lumber so destroyed

as aforesaid. That on or about the 1st day of October, 1920, the plaintiffs collected the sum of \$70,000 as insurance paid for the loss of said lumber, and thereafter, and on or about the 1st day of November, 1920, plaintiffs collected the further sum of \$60,000 as insurance on account of the loss of said lumber as aforesaid, and that by reason of the premises it was then the duty of the plaintiffs at the time the said respective sums were received to pay to the defendant the sum of \$25.00 per thousand feet upon said 3,015,938 feet of lumber, that is to say, the sum of \$75,398.45; but that said sum has not been paid nor any part thereof, save and except the sum of \$60,000 paid to the defendant by the plaintiffs on the 2d day of October, 1920, and there still remains due and owing to the defendant from the plaintiffs on account of the money collected from insurance upon said lumber as aforesaid, the sum [61] of \$15,398.45, together with interest thereon at the rate of eight per cent per annum from the 1st day of November, 1920, less the sum of \$13,999.44 credited to plaintiffs by the defendant as hereinbefore alleged.

IX.

That subsequent to the said 3d day of August, 1920, defendant continued to perform its obligations under the said contract and duly performed all of the conditions of said contract on its part to be performed and that subsequent to the 3d day of August, 1920, and prior to the 8th day of November, 1920, the plaintiffs cut, sawed and manufactured 1,615,786 feet of lumber under the terms of said

contract and defendant loaned and advanced to the plaintiffs upon the said lumber the sum of \$20.00 per thousand feet thereof, which loans and advances were made as follows, to wit: The sum of \$10,289.98 was loaned on the 2d day of September, 1920, on account of 514,499 feet of lumber, the sum of \$8,026.30 was loaned on the 30th day of September, 1920, on 401,315 feet of lumber, the sum of \$13,999.44 was loaned on the 8th day of November, 1920, on 699,972 feet of lumber by defendant's then crediting to the plaintiffs that sum of money as a payment upon the said sums of \$15,398.45 then due the defendant from the plaintiffs as stated in paragraph VIII hereof, and defendant, at the time of making and allowing said credit, notified the plaintiffs that said credit had been made.

X.

That plaintiffs are entitled to credits upon the said amounts so due as aforesaid by reason of the remainder or balance received upon the purchase price of the eleven carloads of lumber referred to in paragraph VI hereof, and that the remainders or balances so received and credited to plaintiffs by the defendant, and the dates of the same, were as follows: on the 16th day of September, 1920, the sum of \$1,159.19; on the 21st day of September, 1920, the sum of \$414.45; and on the 5th day of November, 1920, the sum of \$518.36, and on the 22d day of December, 1920, the sum of \$257.64. That no sums whatever other than the sums above stated have been [62] paid defendant upon plaintiff's said account and indebtedness.

XI.

That prior to and at the time of the commencement of this action, the plaintiffs caused said 1,615,786 feet of lumber to be taken possession of by the sheriff of Flathead County, Montana, and wrongfully caused the same to be attached and seized, thereby rendering it impossible for the plaintiffs to perform their said contract or to ship or consign the said lumber so that defendant might sell the same on account of the plaintiffs, and rendered the performance of said contract by the parties hereto wholly impossible, by reason of which it became and is impossible for the defendant to sell said lumber and to procure reimbursement for the loan of \$20.00 per thousand feet upon said lumber, and on account thereof the said sum of \$20.00 per thousand feet upon all of said 1,615,786 feet of lumber became immediately due and payable from the plaintiffs to the defendant, together with interest thereon at the rate of seven per cent per annum from the dates of the respective loans and advances hereinbefore alleged and set out, and the plaintiffs are and were at the time of the commencement of this action indebted to the defendant on account of the premises in the sum of \$31,891.03, together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920.

WHEREFORE, defendant prays judgment against the plaintiffs and each of them upon this, its tenth cause of action, that the said written instrument as aforesaid may be reformed to express the true contract of the parties as aforesaid by

substituting the true names of the plaintiffs and defendant hereto for the words “vendors” and “vendees” wherever the same are used in the said instrument, by striking out the words “sell and” in the second paragraph prior to the paragraph numbered 1 in said instrument, by substituting the word “receive” for the word “buy” in the same paragraph, by substituting the word “delivered” for the word “sold” in the first and eighth numbered [63] paragraphs of said instrument, and by striking out of the paragraph numbered 5 of said instrument the words “the title to and” and the words “and become their property” and defendant prays that upon the instrument so reformed and upon this, its tenth cause of action, defendant may have judgment against the plaintiffs for the sum of \$31.891.03, together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920, for defendant’s costs herein expended, and for such other relief as may be just and equitable.

WHEREFORE, defendant having fully answered, prays that defendant may recover its costs herein expended and that defendant may have judgment against the plaintiffs in accordance with the prayers of its several causes of action and counter-claims hereinbefore set out.

HALL & POPE,
Attorneys for Defendant.

State of Montana,
County of Missoula,—ss.

Charles H. Hall, being first duly sworn says on oath: That he is one of the attorneys for the defend-

ant in the above-entitled action; that said defendant is a corporation of the State of Missouri, and that there is no officer of said corporation within said county of Missoula, at the time this verification is made. That deponent has read the foregoing amended answer and knows the contents thereof and that the same is true to deponent's best knowledge, information and belief.

CHARLES H. HALL.

Subscribed and sworn to before me, this 5th day of May, 1921.

[Seal]

WALTER L. POPE,
Notary Public for the State of Montana, Residing
at Missoula, Therein.

My commission expires October 13, 1923.

Service acknowledged June 7, 1921.

HENRY H. PARSON,
Attorneys for Plaintiffs.

Filed June 7, 1921. C. R. Garlow, Clerk U. S.
District Court, District of Montana. [64]

That on April 8th, 1921, Reply was duly filed herein, in the words and figures following, to wit:
[65]

In the District Court of the United States for the
District of Montana.

EDWARD DONLAN and BEN W. HENDER-
SON, Copartners Doing Business Under the
Firm Name and Style of DONLAN and
HENDERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER
COMPANY, a Corporation of Jackson
County, Missouri,

Defendant.

Reply.

Come now the plaintiffs and for reply herein to
defendant's answer deny each and every allegation
and all allegations therein contained not herein spe-
cifically admitted to be true.

I.

Plaintiffs herein for reply to defendant's first
alleged counterclaim deny each and every allegation
and all allegations therein contained save and ex-
cept those herein specifically admitted to be true.

II.

Plaintiffs admit the allegations of paragraphs
numbered one (1), two (2), three (3) and four (4)
in said first counterclaim in said answer contained.

III.

Replying to paragraph five (5) in said last-men-
tioned counterclaim, these plaintiffs deny that the
defendant is the owner and holder of said note or

any part thereof; and in this particular plaintiffs further allege that the said note and the whole thereof, both as to principal and interest, has been and is fully paid, and that the plaintiffs have been and are fully discharged and exonerated from any and all claim, demand or liability thereunder, [66] and that they are entitled to the possession of said note.

COUNT NUMBER TWO.

Plaintiffs herein for reply to defendant's second alleged counterclaim deny each and every allegation and all allegations therein contained save and except those herein specifically admitted to be true.

I.

Plaintiffs admit the allegations of paragraphs numbered (1), two (2), three (3), and four (4) in said second counterclaim in said answer contained.

II.

Replying to paragraph five (5) in said last-mentioned counterclaim, these plaintiffs deny that the defendant is the owner and holder of said note or any part thereof; and in this particular plaintiffs further allege that the said note and the whole thereof, both as to principal and interest, has been and is fully paid, and that the plaintiffs have been and are fully discharged and exonerated from any and all claim, demand or liability thereunder, and that they are entitled to the possession of the said note.

COUNT NUMBER THREE.

Plaintiffs herein for reply to defendant's third

alleged counterclaim deny each and every allegation and all allegations therein contained save and except those herein specifically admitted to be true.

I.

Plaintiffs admit the allegations of paragraphs numbered one (1), two (2), three (3), and four (4) in said third counterclaim in said answer contained.

II.

Replying to paragraph five (5) in said last-mentioned [67] counterclaim, these plaintiffs deny that the defendant is the owner and holder of said note or any part thereof; and in this particular plaintiffs further allege that the said note and the whole thereof, both as to principal and interest, has been and is fully paid, and that the plaintiffs have been and are fully discharged and exonerated from any and all claim, demand or liability thereunder, and that they are entitled to the possession of said note.

COUNT NUMBER FOUR.

Plaintiffs replying herein to defendant's counterclaim Number Four deny each and every allegation and all allegations therein contained save and except as herein specifically admitted to be true.

I.

Plaintiffs admit the allegations of paragraphs numbered one (1), two (2), and four (4), in said counterclaim and answer contained.

II.

Plaintiffs replying to paragraphs three (3) and five (5) of said counterclaim number four, deny that the legal effect of the said contract as set forth

therein, and deny that either of the plaintiffs or the defendant understood the said contract as therein alleged, and further deny that on the conduct, acts and course of dealing by the parties hereto, or any of them, that it was understood or agreed by the parties hereto, that the defendant was acting only and simply as a factor or broker or that the many bills of sale, or any of them, to said lumber mentioned in said paragraphs were merely given as security or in the nature of mortgages to secure any loans made by the defendant to plaintiffs.

And in this regard the plaintiffs allege that the [68] contract in paragraph four (4) of said counterclaim, and as set forth in plaintiffs' complaint was and is clear, certain and unambiguous; that it was never contemplated by the parties hereto or any of them; that said contract and bills of sale did not convey to and vest in the defendant full and complete title to all of the lumber covered thereby and mentioned in defendant's answer and plaintiff's complaint.

That every loan made by the defendant to plaintiffs was evidenced by a promissory note, executed and delivered to the defendant, three of which are described in the first three (3) counterclaims in its answer, and all of which have been paid; that all other payments made by the defendant to plaintiffs were payments on the purchase price of said lumber, never evidenced by any note of plaintiffs, and was to defendant's knowledge and by mutual consent credited on plaintiffs' books as cash on said purchase price; and

in the said contract itself the defendant reserved the use of plaintiffs' yard and planer to complete and finish the dressing and manufacture of defendant's said lumber to protect it against loss or damage in the event that plaintiffs should stop manufacturing and delivering lumber under the said contract; and that during all of the said time or period since the execution and delivery of said contract of sale, the parties hereto have construed the same according to its tenor and four corners alone, and have treated each other as vendors and vendee, and in no other or different capacity.

That by reason of the premises the defendant herein is estopped to assert and claim that the said lumber so described in the complaint and answer herein was not that of the defendant alone.

III.

Plaintiffs replying to paragraph six (6) in said counterclaim contained admit that the defendant paid, but deny that it loaned, Forty Thousand (\$40,000) Dollars on account of the [69] two million (2,000,000) feet of lumber then on hand, manufactured and piled in the said sawmill; admit that thereafter and prior to the 3d day of August, 1920. plaintiffs sawed, cut and manufactured at said mill one million three hundred thirty-eight thousand four hundred twelve (1,338,412) additional feet of lumber under said contract; admit that the defendant shipped through the plaintiff eleven (11) carloads of lumber, containing three hundred twenty-two thousand four hundred seventy-four (322,474) feet.

Plaintiffs further allege that only ten (10) cars, containing a total of two hundred eighty-four thousand thirty-five (284,035) feet of lumber, were shipped prior to the said fire on the 3d day of August, 1920, and that at the time of said fire there were in said yards three million fifty-four thousand three hundred seventy-seven (3,054,377) feet of lumber, on all of which the defendant had paid as part of the purchase price the sum of Twenty Dollars (\$20) per thousand feet, and for which it had received bills of sale under which title and possession passed to it, and it took actual possession thereof and became the owner thereof; and that the defendant herein at no time or under any circumstances loaned any money to these plaintiffs whatsoever upon said timber or any part thereof.

IV.

Admit allegations of paragraph seven (7).

Replying to said paragraph further, plaintiffs allege that there were three insurances of said lumber as follows: the first and last insurance papers payable to the parties hereto as their interests might appear, but that in one, the insurance for Sixty Thousand (\$60,000) Dollars, was through inadvertence—the same having been ordered over long distance telephone from Pablo, Montana, to Spokane, Washington,—made and given in the name of the plaintiffs alone; and in this connection the plaintiffs [70] further aver and allege that defendant was advantaged and not injured or damaged thereby.

V.

Replying to paragraph eight (8) in said counterclaim, plaintiffs admit that on the 3d day of August, 1920, there were three million fifteen thousand nine hundred thirty-eight (3,015,938) feet of lumber destroyed by fire; plaintiffs further allege that at said time of said fire the title to said lumber and to every part thereof as well as the possession inhered and vested in this defendant, and that plaintiffs voluntarily and temporarily advanced and loaned to the defendant, and charged its account with, said sum of Sixty Thousand (\$60,000) Dollars, in course of the general transactions which are the subject of the plaintiffs' causes of action in their complaint herein; and by reason thereof defendant has been temporarily advantaged instead of injured thereby.

VI.

Replying to paragraph nine (9) of said counterclaim, plaintiffs deny that the defendant herein continued in any manner to perform and discharge the conditions of said contract on its part to be performed and discharged; that it breached its said contract in failing to pay for the lumber sold and delivered to it; that under the terms of said contract the purchase price for the same, after delivery thereof, should have been paid to the plaintiffs, and, in this regard, plaintiffs allege that on the — day of November, 1920, a draft for the sum of Thirteen Thousand Nine Hundred Ninety-nine and Forty-four One Hundredths (\$13,999.44) Dollars was drawn upon the defendant by the plaintiffs for

lumber manufactured, piled, stacked, delivered and sold to the defendant, which said sum was a part of the purchase price thereof due to the plaintiffs under said contract, to wit, Twenty Dollars (\$20) per thousand feet, and that under said contract the defendant herein had no right whatsoever to keep and retain said Thirteen Thousand [71] Nine Hundred and Ninety-nine and $44/100$ (\$13,999.44) Dollars, but were obligated to pay the same to the plaintiffs on honor of said draft or otherwise in cash.

In this regard plaintiffs deny that they ever conceded to or consented to the retention or keeping by the defendant of said Thirteen Thousand Nine Hundred Ninety-four and $44/100$ (\$13,999.44) Dollars, but has at all times demanded of the defendant that it pay the same under the terms and conditions of said contract.

Further replying to said paragraph (9) of said counterclaim, the plaintiffs admit that the sum of Ten Thousand Two Hundred Eighty-nine and $98/100$ (\$10,289.98) Dollars was paid to the plaintiffs by the defendant on the 2d day of September, 1920, on account of five hundred fourteen thousand four hundred ninety-nine (514,499) feet of lumber, and further admit that the sum of Eight Thousand Twenty-six and $30/100$ (\$8,026.30) Dollars was paid to them by the defendant on the 30th day of September, 1920, on four hundred one thousand three hundred fifteen (401,315) feet of lumber, but in this regard plaintiffs allege that the said sums were not in any sense loans nor was any part thereof a

loan, but that the whole and the total amount thereof was paid as advances and as part purchase price for the said lumber so manufactured, piled, sold, delivered to and accepted by the defendant, to wit, at the rate of Twenty Dollars (\$20) per thousand feet thereof.

VII.

Plaintiffs replying to paragraph ten (10) of said counterclaim deny specifically that the credits herein named are the only credits to which these plaintiffs are entitled and in respect thereto allege on information and belief the amounts therein contained and named are the net amounts after improperly deducting charges of demurrage, charging plaintiffs with commissions in [72] violation of said contract, deducting a trade discount, and commission of fifteen (15%) per cent, and other improper deductions unknown to these plaintiffs; and in that regard plaintiffs say that they are entitled to far greater allowances and were entitled to payments not shown or alleged in defendant's answer.

VIII.

Plaintiffs herein replying to paragraph eleven (11) of said counterclaim admit that they caused said one million six hundred fifteen thousand seven hundred eighty-six (1,615,786) feet of lumber to be attached and taken possession of by the Sheriff of Flathead County; and in that regard plaintiffs allege that the defendant has also under its answer herein had the same property attached, and on information and belief states that the

same is now in the care, custody and control of United States Marshal.

Further replying to said paragraph, plaintiffs deny each and every allegation and all allegations therein contained, and specifically do they deny that they are indebted to the defendant in the sum of Thirty-one Thousand Eight Hundred Ninety-one and 03/100 (\$31,891.03) Dollars or in any other sum or amount at all.

COUNT NUMBER FIVE.

Plaintiffs herein for reply to defendant's fifth alleged counterclaim, deny each and every allegation and all allegations therein contained save and except as herein specifically admitted to be true.

I.

Plaintiffs admit the allegations in paragraphs one (1) and two (2) in said alleged counterclaim contained.

II.

Replying to paragraph three (3) in said counterclaim, [73] plaintiffs admit receipt of Forty Thousand (\$40,000) Dollars on the 15th of April, 1920, but allege that the same was not a loan but a part payment on the purchase price of said lumber; plaintiffs admit the receipt of Seventeen Thousand Eight Hundred Thirty-five and 52/100 (\$17,835.52) Dollars on the 20th day of June, 1920, but allege that Eight Thousand Nine Hundred Seventeen and 76/100 (\$8,917.76) Dollars thereof was not a loan but was a cash advance and part payment of the purchase price of the said lumber described in plaintiffs' complaint.

III.

Plaintiffs admit receipt of Eight Thousand Nine Hundred Thirty-two and 70/100 (\$8,932.70) Dollars on the 3d day of August, 1920, but allege that one-half ($\frac{1}{2}$) thereof was a cash advance and part payment on the said purchase price of lumber, and that the other one-half of said two last-mentioned items were not paid in cash but were credited upon the notes of these plaintiffs; plaintiffs admit the receipt of Ten Thousand Two Hundred Eighty-nine and 98/100 (\$10,289.98) Dollars on the 2d day of September, 1920, and the sum of Eight Thousand Twenty-six and 30/100 (\$8,026.30) on the 30th day of September, 1920, but state and allege that neither of said payments was a loan but that both were advances and payments as part purchase price of the said lumber hereinbefore described. As to the item of Thirteen Thousand Nine Hundred Ninety-nine and 44/100 (\$13,999.44) Dollars, alleged to have been paid to these plaintiffs on the 8th of November, 1920, plaintiffs generally and specifically deny, and allege that the said sum was to and should have been paid to these plaintiffs by the defendant; that a draft was drawn on the defendant therefor, but payment has been and still is refused.

Further replying to said paragraph three (3), [74] plaintiffs allege that the remainder of the items mentioned in said paragraph are inaccurate and incorrect; that there are wrongful deductions for commissions, for freight charges, for demurrage and the like made from the said items, and that in

truth and in fact the sum so due on all those items, save the item of Sixty Thousand (\$60,000) Dollars, with which plaintiffs should be credited on ten (10) cars of lumber, is Nine Thousand Thirty-four and 12/100 (\$9,034.12) Dollars, and on the eleventh car of lumber plaintiffs state on information and belief they should be credited with Twelve Hundred (\$1,200) Dollars, making a total credit of Ten Thousand Two Hundred Thirty-four and 12/100 (\$10,234.12) Dollars.

Plaintiffs deny generally and specifically that they are indebted to the defendant in the sum of Thirty-two Thousand Two Hundred Twenty-four and 72/100 (\$32,224.72) Dollars, or in any other sum whatsoever or at all.

COUNT NUMBER SIX.

Plaintiffs herein for reply to defendant's sixth alleged counterclaim deny each and every allegation and all allegations therein contained save and except those herein specifically admitted to be true.

I.

Plaintiffs admit the allegations of paragraphs numbered one (1) and (2) in said sixth counterclaim in said answer contained.

II.

Replying to paragraph numbered three (3) in said alleged counterclaim, plaintiffs deny each and every allegation and all allegations therein contained.

III.

Replying to paragraph four (4), plaintiffs allege [75] that any and all moneys due or ever due

from the plaintiffs to the defendant have been and are fully paid and plaintiffs have been fully exonerated and discharged therefrom.

COUNT NUMBER SEVEN.

Plaintiffs herein for reply to defendant's seventh alleged counterclaim deny each and every allegation and all allegations therein contained save and except those herein specifically admitted to be true.

I.

Plaintiffs admit the allegations of paragraphs numbered one (1) and two (2) in said seventh counterclaim in said answer contained.

II.

Plaintiffs deny the allegations of paragraph three (3) in said counterclaim set forth, and allege the facts to be that the plaintiff received, long after the said fire, the total of One Hundred Thirty Thousand (\$130,000) Dollars insurance, which insurance covered and was in payment of the lumber owned by the defendant herein together with several hundred thousand feet of lumber owned by the plaintiffs herein.

COUNT NUMBER EIGHT.

Plaintiffs replying herein to defendant's counterclaim number eight deny each and every allegation and all allegations therein contained save and except as herein specifically admitted to be true.

I.

Plaintiffs admit the allegations of paragraphs numbered one (1), two (2) and four (4) in said counterclaim contained. [76]

II.

Plaintiffs replying to paragraphs three (3) and five (5) of said counterclaim number eight, deny that the legal effect of the said contract as set forth therein and deny that either of the plaintiffs or the defendant understood the said contract as therein alleged, and further deny that on the conduct, acts and course of dealing by the parties hereto, or any of them, that it was understood or agreed by the parties hereto that the defendant was acting only and simply as a factor or broker or that the many bills of sale; or any of them, to said lumber mentioned in said paragraphs were merely given as security or in the nature of mortgages to secure any loans made by the defendant to plaintiffs.

And in this regard the plaintiffs allege that the contract in paragraph four (4) of said counterclaim, and as set forth in plaintiffs' complaint was and is clear, certain and unambiguous; that it was never contemplated by the parties hereto or any of them, that said contract and bills of sale did not convey to and vest in the defendant full and complete title to all of the lumber covered thereby and mentioned in defendant's answer and plaintiffs' complaint.

That every loan made by the defendant to plaintiffs was evidenced by a promissory note, executed and delivered to the defendant, three of which are described in the first three (3) counterclaims in its answer, and all of which have been paid; that all other payments made by the defendant to plain-

tiffs were payments on the purchase price of said lumber, never evidenced by any note of plaintiffs, and was to defendant's knowledge and by mutual consent credited on plaintiffs' books as cash paid on said purchase price; that in the said contract itself the defendant reserved the use of plaintiffs' yard and planer to complete and finish the dressing and manufacture of defendant's said lumber to protect it against loss or damage in the event that plaintiffs [77] should stop manufacturing and delivering lumber under the said contract; and that during all of the said time or period since the execution and delivery of said contract of sale, the parties hereto have construed the same according to its tenor and four corners alone, and have treated each other as vendors and vendee, and in no other or different capacity.

That by reason of the premises the defendant herein is estopped to assert and claim that the said lumber so described in the complaint and answer herein was not that of the defendant alone.

III.

Replying to paragraph six (6) of said counterclaim number eight, plaintiffs deny that the defendant performed conditions under said contract to be performed; deny that it loaned the plaintiffs herein the sum of Forty Thousand (\$40,000) Dollars, and in that regard plaintiffs allege that the said Forty Thousand (\$40,000) Dollars was received by them from the defendant, but that the same was in part payment of the purchase price of said lumber.

Plaintiffs further deny that the said bill of sale for the said lumber, described in said paragraph, was in the nature of a mortgage or as security for the amounts paid per thousand on said lumber, but in that regard state the facts to be that the said lumber had been delivered to and accepted by the defendant, was in its possession, and it was the sole and exclusive owner thereof.

Further replying to said paragraph, plaintiffs admit that they sawed between the date of said contract and the 3d day of August, 1920, and had stacked at the said mill, one million three hundred thirty-eight thousand four hundred twelve (1,338,412) feet of lumber; plaintiffs deny that the defendant loaned to the plaintiffs the sum of Twenty (\$20) Dollars [78] per thousand thereon or any other sum thereon, but allege that all sums paid were in the nature of advancements on and in part payment of the purchase price thereof.

Plaintiffs further admit that on June 28, 1920, they received from the defendant Seventeen Thousand Eight Hundred Thirty-five and $52/100$ (\$17,835.52) Dollars, but allege that only one-half ($1/2$) thereof was a loan, which, by agreement of the parties, was to be credited on plaintiffs' notes, sued on in the first three counts of defendant's counterclaim, and that the other half thereof was paid to the plaintiffs as an advance on the said part purchase price for the said lumber so stacked, owned and possessed by the defendant.

Plaintiffs further admit receipt of Eight Thousand Nine Hundred Thirty-two and $72/100$ (\$8,-

932.72) Dollars, on the 3d day of August, 1920, but allege that that also was not a loan but was advanced as part of the purchase price of the lumber so purchased, owned and possessed by the defendant, and allege in this regard further that only one-half ($\frac{1}{2}$) of that sum was paid as the purchase price, while the other half thereof was, by agreement of the parties, to be credited on the notes so sued on in defendant's answer and counterclaim.

Plaintiffs deny that defendant sold the said lumber for or on account of the plaintiffs, but allege that the defendant sold the same on its own account, and that plaintiffs herein are entitled to an accounting from the defendant for the entire transaction covering such last mentioned sum.

IV.

Replying to paragraph seven (7) of said last-mentioned counterclaim, plaintiffs admit that one car of lumber was preserved from the fire and that it contained thirty-nine thousand three hundred forty-five (39,345) feet of lumber; plaintiffs further allege that the defendant has never accounted to the [79] plaintiffs for said car of lumber or any part thereof, nor for the proceeds thereof, and on information and belief plaintiffs state that the said defendant is indebted to the plaintiffs on said car in the sum of Twelve Hundred (\$1,200) Dollars, and that plaintiffs are entitled to an accounting therefor. Plaintiffs deny that they have any knowledge or information as to what was done with said car of lumber.

Further answering said paragraph, plaintiffs al-

lege that the remaining sums mentioned and stated in said paragraph are inaccurate and incorrect; that the defendant herein has wrongfully charged plaintiffs for delays, excess freight, demurrage and other charges the exact amounts of which are to plaintiffs unknown and that plaintiffs are entitled to a full accounting from the defendant therefor.

V.

Plaintiffs deny each and every allegation and all allegations in paragraph eight (8) of said counter-claim contained.

VI.

Replying to paragraph nine (9) in said counter-claim contained plaintiffs admit that there were destroyed three million fifteen thousand nine hundred thirty-eight (3,015,938) feet of lumber in the said fire on August 3, 1920, but in that regard allege that there was a greater number of feet destroyed at that time and place, to wit, three million fifty-four thousand three hundred seventy-seven (3,054,377).

Plaintiffs further deny that the said property was the property of the plaintiffs, but, as hereinbefore alleged, state that it was the defendant's property, wholly and exclusively.

Plaintiffs deny each and every other allegation in said paragraph contained.

VII.

Replying to paragraph ten (10) in said counter-claim [80] contained, plaintiffs allege that the plaintiffs delivered to and gave a bill of sale for one million six hundred fifteen thousand seven hundred eighty-six (1,615,786) feet of lumber, in said yards,

and that the title was vested in and possession thereof taken by the defendant, but they deny that the defendant paid the sum of Twenty Dollars (\$20) per thousand on the said number of feet of lumber, and in that regard allege that the defendant herein paid the plaintiffs the sum of Twenty (\$20) Dollars per thousand for only nine hundred fifteen thousand eight hundred fourteen (915,814) feet, and that they have never paid the balance thereof; that demand has been made therefor and payment has been and still is refused.

VIII.

Replying to paragraph eleven (11) of said counterclaim contained, plaintiffs deny each and every allegation therein contained, and in this regard plaintiffs allege that the defendant has not given the plaintiffs due credit for the amount so due them, and that on each of the said sums so named in said paragraph the defendant has wrongfully charged the plaintiffs with excess freight, demurrage, commissions and other charges to the plaintiffs unknown, for which the plaintiffs are entitled to and request an accounting.

IX.

Replying to paragraph twelve (12) in said counterclaim, plaintiffs admit that they attached the lumber therein described and in that regard plaintiffs further allege that the defendant has also attached the said lumber in said paragraph contained, on its alleged counterclaim, and the same is now in the possession of the United States Marshal of this state or his keeper or custodian thereof.

Plaintiffs further allege that the said attachment was rightfully made in that the defendant breached its contract with the plaintiffs in this, that it was indebted to the plaintiffs [81] in the sum of Thirteen Thousand Nine Hundred Ninety-nine and 44/100 (\$13,999.44) Dollars, which was due, owing and unpaid to the plaintiffs from the defendant at the time of said attachment; that the defendant further breached its said contract in that the said notes sued in defendant's answer were paid by the plaintiffs and the defendant failed and refused to deliver the same to plaintiffs upon demand.

X.

Replying to paragraph thirteen (13) of said counterclaim, plaintiffs deny each and every allegation therein contained.

COUNT NUMBER NINE.

Plaintiffs, replying herein to defendant's counterclaim number nine, deny each and every allegation and all allegations therein contained save and except as herein specifically admitted to be true.

I.

Replying to paragraphs one (1) and two (2) and three (3), plaintiffs admit the allegations in said paragraphs contained.

II.

Plaintiffs deny each and every allegation in paragraphs four (4) and five (5) contained, and in that regard allege that there were three insurance transactions covering said lumber; in the first and third of which insurance policies were taken out to cover the rights of the parties hereto as their respective

interests should appear, and that in the second insurance transaction, through an inadvertence, caused by long distance telephone communication from Missoula County to Spokane, Washington, the policies were made payable to the plaintiffs alone, but in that regard plaintiffs allege that the defendant has no cause for complaint in that they have been fully paid, and [82] overpaid, on all debts, obligations or demands arising out of the transactions mentioned in the pleadings in this case, and the defendant has been benefited and advantaged, and not injured or damaged thereby.

III.

Replying to paragraph six (6) of said counterclaim, plaintiffs admit that not only three million fifteen thousand nine hundred thirty-eight (3,015,938) feet of lumber were burned on the 3d day of August, 1920, but allege that three million fifty-four thousand three hundred seventy-seven (3,054,377) feet thereof were burned and destroyed at said time and place, all of which belonged to and was in the possession of the defendant; but allege that in addition thereto hundreds of thousands of feet belonging to the plaintiffs were likewise destroyed, all of which lumber belonging to both of the parties hereto, was covered by the said insurance policies; plaintiffs admit collecting one hundred thirty thousand (\$130,000) Dollars from the said policies so covering all of the said timber belonging to the defendant, on the one hand, and to the plaintiffs, on the other, and in that regard say that the defendant

herein has been fully and completely compensated and paid.

Plaintiffs deny that the defendant has been damaged in the sum of Fifteen Thousand Three Hundred Ninety-eight and 45/100 (\$15,398.45) Dollars, or in any other sum of money at all.

IV.

Replying to paragraph seven (7) of said counterclaim, plaintiffs deny each and every allegation therein contained and allege the facts to be, that it is not the proper subject of a counterclaim in that the alleged facts did not arise and exist at the time of the commencement of plaintiffs' cause of action, but that the said attachment was made after the filing thereof by [83] the plaintiffs in the District Court of the Fourth Judicial District in the State of Montana in and for the County of Missoula.

WHEREFORE, plaintiffs pray,

(1) That defendant take nothing by either of his alleged causes of action or counterclaim;

(2) That the plaintiffs have judgment in accordance with the prayer of their complaint, and

(3) For costs and such other, further and different relief as plaintiffs are entitled to.

A. J. VIOLETTE and

HARRY H. PARSONS,

Attorneys for Plaintiffs.

State of Montana,

County of Missoula,—ss.

———, being first duly sworn upon his oath, deposes and says:

That he is one of the plaintiffs named in the above-entitled action; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge except the matters therein alleged upon information and belief, and as to those he believes it to be true.

Subscribed and sworn to before me this —— day of April, 1921.

[Seal]

_____,
Notary Public for the State of Montana, Residing
at Missoula.

My commission expires the —— day of ——, 19—.

Service by true copy admitted this 8th day of April, 1921.

_____,
Attorneys for Defendant. [84]

Service of the foregoing reply is hereby accepted and acknowledged and a true copy thereof received this 7th day of April, 1921; and the absence of a verification thereof is hereby waived temporarily providing that the same be properly verified at or before trial of said action.

_____,
Attorneys for Defendants. [85]

State of Montana,
County of Missoula,—ss.

Harry H. Parsons, being first duly sworn, upon his oath, deposes and says:

That he is the agent and attorney of the plaintiffs, Edward Donlan and Ben W. Henderson, in

the above and foregoing action, and as such has the right, power and authority to make this verification in their behalf; that he has read the above and foregoing reply, knows the contents thereof, and that it is true to his best information, knowledge and belief; that he makes this verification for the reason that at this time one of the plaintiffs, Ben. W. Henderson, is without the county of Missoula, wherein affiant resides, and that the other plaintiff, viz., Edward Donlan, is about forty (40) miles from the city of Missoula, on the Flathead Indian Reservation, and cannot be reached by either telephone or telegraph without sending a messenger some six or seven miles, and that the contents of the above reply are known to both plaintiffs herein, for which reason affiant makes this verification.

HARRY H. PARSONS.

Subscribed and sworn to before me this 8th day of April, 1921.

[Seal]

THOMAS N. MARLOWE,
Notary Public for the State of Montana, Residing
at Missoula.

My commission expires the 9th day of March, 1923. [86]

In the District Court of the United States in and
for the District of Montana.

EDWARD DONLAN and BEN W. HENDERSON,
Copartners Doing Business Under the Firm
Name and Style of DONLAN AND HEN-
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER
COMPANY, a Corporation of Jackson,
County, Missouri,

Defendant.

Affidavit of Ruby Brome.

State of Montana,
County of Missoula,—ss.

Ruby Brome, being first duly sworn, upon her
oath deposes and says:

That she is not interested in the subject matter
and object of the within action or suit; that she is
over the age of eighteen years, and that she did, in
the city and county of Missoula, State of Montana,
on the 8th day of April, 1921, serve a true and cor-
rect copy of the above-entitled reply upon Messrs.
Hall and Pope, attorneys of record for the defend-
ant therein, by handing to Chas. Hall personally, at
their offices, a true and correct copy of the same.

Further affiant saith not.

RUBY BROME.

Subscribed and sworn to before me this 8th day of April, 1921.

[Seal] THOMAS N. MARLOWE,
Notary Public for the State of Montana, Residing
at Missoula.

My commission expires the 9th day of March, 1923.

Filed April 8, 1921. C. R. Garlow, Clerk U. S. District Court, District of Montana. [87]

That thereafter, on August 14th, 1921, the decision of the Court was duly filed herein, in the words and figures following, to wit: [88]

In the District Court of the United States in and for the District of Montana.

DONLAN AND HENDERSON

vs.

TURNER, DENNIS & LOWREY LUMBER CO.,
a Corporation.

Decision.

Each party alleges the other's defaults in performance of a somewhat novel written contract made April 16, 1920, which contract is as follows: That plaintiffs "sell" and defendant "buys" some 2,000 M feet of lumber in a local yard and all there "to be . . . cut" to January 1st, 1921; that immediately "the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per M feet

on all" existing lumber, and "shall also pay and advance" the like sum on future lumber, on inventory by the 10th of each month of piles in the yard; that "the vendees shall also loan to the vendors" \$20,000.00, for which vendors shall execute their note; that to payment of the note, one-half the advance due on future lumber shall be applied by vendee "until . . . fully paid"; that payments or advances and loans shall bear 7% interest per annum "until . . . fully paid," computed and adjusted monthly upon the "balance thereof remaining against the vendors"; that upon "payment of the advance of \$20 . . . the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable to the vendors for the balance of the purchase price, . . . and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and possession given"; that vendors lease the yard to vendees, subject to the former's use for purposes of the contract; that if vendors fail to perform, vendees have right to use vendors' planer at the yard, "to dress said lumber in order to protect" vendees "against loss on account of the amounts advanced hereunder"; that vendors shall manufacture and grade the lumber in accord with specified rules and standard, hold "vendees harmless against any [89] claim or loss which may arise under said rules or standard," at their expense insure for \$25.00 per M. feet all

lumber sold and in yard, loss payable to vendee, and "shall deliver said lumber F. O. B. cars" at the yard, "either dressed or rough, as directed and ordered by the vendees"; that the "vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid . . . and when each car is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced, . . . which draft the vendees agree to honor and pay when presented." The evidence is without material conflict, and the facts, brief and direct, are as follows; there was due performance by both parties, and on August 3, 1920, the lumber in yard on which \$20.00 per M feet had been paid and bills of sale executed, less some 280 M feet shipped, was some 3055 M feet, plaintiffs' unpaid loans, including some \$11,000.00 additional loan in June, represented by notes due at intervals to October 1st, aggregated some \$20,000.00, and the insurance secured by plaintiffs on this and some *other their* lumber, was \$70,000.00 payable to defendant as its interest might appear and \$60,000.00 payable to plaintiffs. That day, an accidental fire destroyed some 3015 M feet of said lumber in the yard, and also other lumber of plaintiffs. The parties continued in performance, but market conditions unfavorable, both parties in need of money, some dispute in reference to insurance, and defend-

ant's attitude, first plainly manifest after the fire, that it was but a selling agent for a commission, created dissatisfaction which culminated in this action commenced on December 20, 1920.

In the *mesne* time plaintiffs had collected all the insurance money, paid \$60,000.00 of it to defendant, at first disputed defendant's right to the stipulated \$25.00 per M feet of the contract, later appeared to acquiesce, but had not accounted for the balance of it at time of action commenced. It appears that from the beginning plaintiffs were less clear than defendant, in conception of the nature of the [90] contract, the relations and the rights it created; and so when defendant's attitude aforesaid developed by self-serving statements mainly, after the fire, plaintiffs either did not perceive its significance or were too ill-advised to contradict or oppose it, for they seemed to acquiesce till suit brought.

After the fire, defendant paid for new cut lumber inventoried in piles and bills of sale given, as follows: \$20.00 per M for some 514 M feet of August cut, by cash without application of any of it to payment of loans to plaintiffs and overdue; the like in respect to some 401 M feet of September cut; \$20.00 per M for some 700 M feet of October cut, by crediting it to plaintiffs' account in respect to the balance of insurance money withheld.

As the 10th of December approached, both parties indicated intent to perform in respect to the November cut, but neither performed.

Throughout the contract, market conditions were unfavorable, and both parties, in hope of im-

provement, acquiesced in few resales and shipments. Ten cars were shipped before the fire, and one car after it, aggregating some 322 M feet. Some of these cars were ordered and shipped before defendant had resold the lumber, and in consequence, before purchasers were found demurrage was incurred in amount some \$600.00.

When plaintiffs commenced this action they attached all said lumber in the yard, and when defendant answered, it also attached the lumber. The pleadings are in accord with the respective theories of the parties and as therein both are in the main in error, and as the action (brought at law, with an equitable defense interposed in the answer, and accounting demanded in the reply) has been tried in the nature of an accounting in equity in respect to a divisible, installment contract, the pleadings need be no more than indicated by brief reference to the theories advanced.

Plaintiffs' is that the contract is of sale for resale, and that they are entitled to recover what they might have received if the *burned* [91] *had* been resold, and to recover the \$20.00 per M feet of the October cut which defendant credited to balance of insurance withheld; and plaintiffs evidently contemplate some accounting in future in respect to said lumber now in yard, when resold by defendant. Defendant's theory is that the contract is of agency for sale, and that it is entitled to recover all factor's advances (the \$20.00 per M. feet paid), expenses, the balance of insurance, and the loans, terminating the contract and accomplishing final settlement.

Both parties abandon certain claims for damages for lost profits, alleged in the pleadings.

To first dispose of defendant's equitable defense of mistake in reducing the contract to writing, and its claim of practical construction in accord with its theory of agency, the mistake was first asserted by it in its amended answer, months after the contract made, performance, destruction of lumber, suit commenced, and is too late. Further, the evidence in support of it is too trifling to warrant discussion; and likewise of the evidence of practical construction, consisting of defendant's belated self-serving statements to that end.

Proceeding to the character of the contract, it has all the elements of sale and only enough of the *indicia* of agency to give some color to a claim of the latter. The lumber inventoried and the \$20.00 per M paid, the absolute property in lumber and money respectively vested in defendant and plaintiffs, beyond return, recall or repayment. Thereafter, plaintiffs have no interest in the lumber save that it be resold for the purposes of the contract, and thereafter the lumber could be attached by defendant's creditors but not by plaintiffs'. Resale is in accordance with defendant's judgment of time, place, person, price and terms, save to be in reasonable time and for the highest reasonably obtainable price. The proceeds are defendants as is any loss of them, plaintiffs having no interest therein but only in the price as the measure of what if anything becomes due them from defendant on resale.

Defendant receives the usual trade discount of a buyer whether or not it concedes it to its [92] vendee on resale. The parties intended and accomplished a sale. The consequences are clear. As owner of the lumber burned, defendant loses its investment therein and its prospective profits, but indemnified to the extent of the stipulated insurance of \$25.00 per M feet, and as owner of the lumber not burned, it is obligated to resell in accordance with the contract. In respect to neither is it entitled to recover from plaintiffs any of the \$20.00 per M by it paid. Nor are plaintiffs entitled to recover what they might have received had the lumber been resold before burned. They sold it to defendant for \$20.00 per M and its promise to resell, whereupon if for a price in excess of the amount due defendant by virtue of the contract, viz., \$20.00 per M plus 17% of the resale price, defendant would pay the plaintiffs the equivalent of such excess. Before resale, no money was due plaintiffs, no debt to them existed. If resale was for an excess price as aforesaid, money would then be due plaintiffs, a debt to them would then be created. The happening of resale alone would determine what if anything was due plaintiffs, the amount, and the time of payment. Defendant's promise to pay was not absolute, but was conditional and plaintiffs' right to payment was not vested but was contingent.

By reason of destruction of the lumber the condition failed, the contingency did not happen, and both the promise and the right expired.

For in these circumstances the law is that the

failure of the event to happen without fault of the promisor, prevents creation of a money debt, terminates the promisee's expectancy of payment, and excuses failure to perform the promise.

See Cases, 13 C. Jur. 114, 631.

A like principle is that if by the express or implied terms of the contract, the promise is conditional on possibility of performance, and performance becomes impossible without fault of the promisor, his liability is discharged.

See Cases 13 C. Jur. 640.

7 Halsbury, Laws of England,
429. [93]

Still another like principle is that if expressly or by implication to effectuate an intent presumed in good faith and fair dealing, the parties contemplate continued existence of the subject matter of the contract in order to accomplish performance, its destruction without fault absolves both from further performance in so far as dependent upon such continued existence.

See Cases, 13 C. Jur. 643.

7 Halsbury, Laws of England, 430.

These principles are controlling here. The sale of lumber made, it was not known that anything would become due plaintiffs, nor amount, nor when. All were contingent, which to determine defendant promised to resell the lumber. It burned and resale before possible became impossible. The contingencies did not happen, the determination was not made. Defendant's promise became impossible without its fault. It is clear the parties contem-

plated the continued existence of the lumber for resale and to determine all said contingencies, because by the contract thus only were they to be determined.

It will be conceded plaintiffs' right to any payment and how much, depended upon resale for a price in excess of the amount due defendant as aforesaid, and it will be conceded that if values depreciated by reason of time, weather, borers, insects and the like, plaintiffs would lose accordingly. That is, if because thereof the lumber resold for no more than due defendant as aforesaid, though worth more at time of sale, plaintiffs would be entitled to no payment from defendant.

And the same principle that in whole or in part would discharge defendant's promise in these circumstances of partial destruction of the lumber or of its value, in whole discharges it in the instant circumstances of fire and total destruction of the lumber. Both parties understood this and both insured. The 2000 M feet first sold to defendant, contemporaneously cost plaintiffs \$35.00 per M. feet. They received \$20.00 per M from defendant, agreed to insure in defendant's interest for \$25.00 per M and did insure for \$35.00 per M the amount they had paid for the 2000 M. Later, they secured \$60,000.00 more insurance, aggregating on all [94] the lumber, \$55,000.00 more than the \$25.00 per M they agreed to carry for defendant on the lumber burned, and all of which they collected. That some of it was on lumber not sold to defendant, does not

detract from the implication in respect to their understanding aforesaid.

It is urged by plaintiffs that as defendant paid them but \$20.00 per M for the lumber burned, and thereon claim the stipulated insurance of \$25.00 per M, \$5.00 thereof is profit which on some equitable principle it ought to share with plaintiffs even though secured by a resale of the lumber. This cannot be maintained. In any view of the parties' respective interests in the burned lumber, even as other co-owners each could insure their or its interest, without liability to share proceeds with the other.

Of their respective interests, they were of the nature of joint adventurers in the proceeds upon resale of the lumber. If for any fortuitous reason, including market conditions, resale was without excess as aforesaid, plaintiffs received nothing; if resale was with excess, plaintiffs received its equivalent; if resale was for less than due defendant, or if no resale could be made, defendant suffered loss accordingly. This determines the chief issue. In the matter of demurrage and excessive freight, the contract bases plaintiffs' right to payment on resale, on the resale price less express deductions and less the implied deduction, it is agreed, of freight. Defendant ordered lumber loaded and shipped before sold and plaintiff complied.

The cars were consigned to defendant at a destination by it named, and when it resold the lumber, the cars were reconsigned to the destination of the purchasers. In consequence demurrage was in-

curred and freight was increased over that of an original consignment to destination of the purchasers. For demurrage or car rent, defendant is not entitled to credit. It is not freight, and freight is the only expense of resale that is by virtue of the contract a credit in defendant's [95] behalf. Shipment before resale may be a departure from the contract, but although therein plaintiffs waived draft upon defendant for the invoice price, they did not also waive the benefit of the contract's protection to them against all expense of marketing the lumber save freight.

The increased freight is "freight" and is a proper credit in defendant's behalf. When plaintiffs dispatched cars before sale, they knew the likelihood of increased freight and acquiesced therein. All of these shipments have been resold save one now "in storage" in St. Louis. Defendant assumes to credit plaintiffs with their dues in respect to them from a time subsequent to resale on the theory it necessarily awaited freight bills.

The contract required defendant to pay plaintiffs' draft upon shipment. Plaintiffs waived this in respect to lumber shipped before resold, but are entitled to credit from date resale made, whether or not defendant ever received freight bills.

In the matter of the loans, all overdue, defendant is entitled to recover them in amount \$16,171.09, deducting credits to plaintiffs consisting of exchange paid and conceded and amounts due upon resales of lumber.

The notes provide for reasonable attorney's fees,

a cross-complaint being equivalent to a "suit," and \$286.75 are allowed. This is one-half what the local rule in general would allow, but defendant's erroneous attitude in respect to the character of the contract tended to precipitate the litigation and requires the lessening of the ordinary allowance.

In the matter of the insurance of \$25.00 per M for defendant, by plaintiffs collected and in part withheld, defendant is entitled to recover it with interest from date collected, in total amount \$1626.67. Against insurance withheld, defendant properly credited to plaintiffs the payment for the October cut of lumber.

In the matter of interest, defendant is entitled to it in accordance with the contract, but to no interest in respect to payments for lumber save if and when worked out upon resale. [96]

Herein, no account is taken of lumber paid for, bills of sale executed, existing and not resold, including the car in storage, save to determine it is the property of defendant, subject to the contract. Computations are to August 10, 1921, and to conform to the decision the account discloses (and the parties virtually so agree) that \$18,084.51 are due to defendant from plaintiffs. In equity, costs are discretionary, and in view of the circumstances it is believed neither party is entitled to costs.

Decree accordingly.

August 4, 1921.

BOURQUIN, J.

Filed Aug. 4, 1921. C. R. Garlow, Clerk. [97]

That thereafter, on September 3d, 1921, an Additional Memorandum Decision of the Court was duly filed herein, in the words and figures following, to wit: [98]

United States District Court, District of Montana.

DONLAN & HENDERSON

vs.

TURNER etc. CO.

Additional Memorandum Decision.

To dispose of disagreements disclosed subsequent to decision, defendant is entitled to freight by virtue of the contract, the parties agree. This includes all legitimate freight and increased freight on reconsignments which plaintiffs knew were necessary and acquiesced in by shipments before sale. Obviously, the trade discount of 2%, like the 15%, is by the contract computed on resale price. The language of the decision in respect to these is palpably wrong, induced by no controversy and inadvertent general comment or illustration.

No principle is known to warrant plaintiffs sharing in defendant's insurance. The case in the Court's mind, Gemstreet Case, 161 Pac. 596, only determines that a fixed present debt must be paid in reasonable time, if the event on which payable, fails.

The decision rewritten, discloses reasons for attorney's fees \$286.75 and no costs. Amount due defendants Aug. 10, 1921, \$18,084.51.

Exchange \$177 conceded by defendant to plaintiff.
Sept. 3, 1921.

BOURQUIN, J.

Filed Sept. 12, 1922. C. R. Garlow, Clerk U. S.
District Court, District of Montana. [99]

That thereafter, on September 22, 1921, Decree and Judgment signed and dated September 21, 1921, was duly filed and entered herein, being in the words and figures following, to wit: [100]

In the District Court of the United States in and
for the District of Montana.

No. 892.

EDWARD DONLAN and BEN W. HENDERSON
Copartners Doing Business Under the Firm
Name and Style of DONLAN AND HEN-
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER
COMPANY, a Corporation of Jackson
County, Missouri,

Defendant.

Judgment and Decree.....	125

This cause came on to be further heard at this term and was argued by counsel; and the Court having filed its decision wherein and whereby it is found that there is due the defendant from the plaintiffs

the sum of \$18,048.51, such sum including interest computed to August 10, 1921, and in which decision it is further found that title to the 1,615,786 feet of lumber cut after August 3, 1920, mentioned in bills of sale and marked and designated with the name of the defendant, passed to the defendant and became defendant's property, subject to the contract described in the pleadings herein, and that defendant is not entitled to recover in this action the \$20.00 per M paid thereon, and that the plaintiffs should recover nothing upon their complaint herein.

It is therefore ORDERED, ADJUDGED AND DECREED as follows:

That the plaintiffs' complaint and causes of action be dismissed.

That the defendant is the owner of 1,615,786 feet of lumber manufactured by plaintiffs since August 3, 1920, and upon which defendant has advanced and paid \$20.00 per M and for which defendant has received bills of sale, and that such lumber is the property of defendant subject to the contract described in the pleadings herein;

And it is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant have and recover judgment against the plaintiffs, and each [101] of them, for the sum of \$18,221.17, for which execution is awarded the defendant, and that neither party recover its costs herein. Computations extended to date of decree.

Dated September 21st, 1921.

BOURQUIN,
Judge.

Filed and entered September 22d, 1921. C. R. Garlow, Clerk. [102]

That thereafter, on February 2d, 1922, statement of the evidence was duly approved and filed herein, being in the words and figures following, to wit:
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In the District Court of the United States for the
District of Montana.

Case No. 892.

EDWARD DONLAN and BEN W. HENDERSON,
Copartners Doing Business Under the Firm
Name and Style of DONLAN AND HEN-
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER
COMPANY, a Corporation of Jackson
County, Missouri,

Defendant.

Statement of the Evidence.....	134

BE IT REMEMBERED: That the above-entitled cause came regularly on for hearing on the 7th day of June, 1912, at 10:00 o'clock A. M. of said day, at Missoula, Montana, before the Honorable GEO. M. BOURQUIN, Judge of the above-entitled court, sitting without a jury, Harry H. Parsons, Esq., and A. J. Violette, Esq., appearing for the plaintiffs, and Messrs. Hall & Pope and Rees Turpin, Esq., appearing for the defendant; whereupon, the following evidence was introduced:

PLAINTIFF'S CASE.

Testimony of Ben W. Henderson, for Plaintiffs.

BEN W. HENDERSON, one of the plaintiffs, called as a witness in their behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Ben W. Henderson, and I am a member of the firm of Donlan and Henderson. I am acquainted with Mr. Dennis and Mr. Lowry, of the firm of Turner, Dennis & Lowry. In [107—1] April, 1920, I had business dealings on behalf of my firm with this corporation; we delivered to them some lumber—two million feet in April, 1920. Plaintiffs' Exhibit 1 is the bill of sale that we gave to the defendant at that time for the two million feet of lumber.

By Mr. PARSONS.—It reads as follows:

Plaintiffs' Exhibit No. 1.

BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS: That we, Donlan & Henderson a copartnership of Pablo, Montana, the parties of the first part, for and in consideration of the sum of One Dollars, lawful money of the United States of America, to them in hand paid by TURNER, DENNIS & LOWRY COMPANY, a corporation, of Jackson County, Missouri, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said

party of the second part, its successors and assigns

All the lumber now owned by us (Donlan & Henderson) in pile at our sawmill lumber yard at Fletcher Spur, near Pablo, Flathead County, Montana, containing approximately Two Million (2,000,000) board feet.

This bill of sale is given, however, subject to our vendors' lien upon all of said lumber, for balance due thereon from said parties of the second part to the parties of the first part, according to a certain contract of sale, entered into between said parties on this 16th day of April, 1920.

TO HAVE AND TO HOLD the Same, to the said parties of the second part, its successors and assigns forever; subject, however of the vendors' lien before mentioned, and we do for our heirs, executors and administrators, covenant and agree to and with the said parties of the second part its successors and [108—2] assigns, to warrant and defend the sale of the said property, goods and chattels hereby made, unto the said parties of the second part, its successors and assigns, against all and every person whomsoever, lawfully claiming or to claim the same.

IN WITNESS WHEREOF we have hereunto set our hand and seal the 16th day of April in the year of our Lord one thousand nine hundred and twenty.

DONLAN & HENDERSON. (Seal)

By E. DONLAN. (Seal)

E. DONLAN. (Seal)

BEN W. HENDERSON. (Seal)

(Testimony of Ben W. Henderson.)

Signed, sealed and delivered in the presence of:

A. J. VIOLETTE.

By the WITNESS.—Thereafter we delivered the lumber described in the bill of sale to the defendant herein. Plaintiffs' Exhibit 2 is the original bill of sale made by Mr. Donlan in behalf of the firm and delivered by the plaintiffs to the defendant.

Plaintiffs' Exhibit 2, then read to the Court by Mr. Parsons, conveys from Donlan & Henderson, for a consideration of \$8,917.76, to Turner, Dennis & Lowry Company, 891,776 feet of lumber in yard at Fletcher Spur, Flathead County, Montana, and is dated June 28th, 1920.

By the WITNESS.—Thereafter we as a firm and on behalf of the plaintiffs delivered to the defendants and gave them a bill of sale for other lumber Plaintiffs' Exhibit 3 is the bill of sale evidencing the delivery of the lumber and correctly stating the amount delivered to defendant.

Plaintiffs' Exhibit 3, then read to the Court by Mr. Parsons, conveys from Donlan and Henderson, for a consideration of \$4,466.36, to Turner, Dennis & Lowry Lbr. Co.

446,636 ft. @ \$20.00 /M.....	\$8,932.72
Less \$10.00 /M.	4,466.36

\$4,466.36

[109—3] now being in the County of Flathead, State of Montana, the date of the bill of sale being left blank.

(Testimony of Ben W. Henderson.)

By the WITNESS.—We delivered and gave a bill of sale for other lumber Exhibit 4 is the bill of sale and property expresses the quantity of lumber delivered at that time.

Plaintiffs' Exhibit 4, then read to the Court by Mr. Parsons, conveys from Donlan and Henderson, for a consideration of \$10,289.98, to Turner, Dennis & Lowry Lumber Co., 514,499 feet of lumber @ \$20.00 per M., and is dated the 2d day of September, 1920.

By the WITNESS.—We had an agreement or contract with these gentlemen under which we delivered and sold this lumber; Plaintiffs' Exhibit 5, is the contract under which this delivery and sale was made.

Thereupon, over the objection of the defendant, Plaintiffs' Exhibits 1, 2, 3, 4 and 5 were admitted in evidence, as was also Defendant's Exhibit "A."

Plaintiffs' Exhibit 5, so admitted in evidence, is the contract a copy of which is attached to both the complaint and the amended answer as exhibits.

By the WITNESS.—We had delivered to the defendant, up to and including the 3d day of August 1920, 2,338,412 feet of lumber. That was the total that was consumed by fire. The figures are [110—4] 3,338,412 feet; there was two million in what we called the old yard and there was 1,338,412 feet in the new yard. That was the total amount conveyed by these bills of sale. To effect a delivery of that lumber to the defendant we cut and piled, as instructed by them, and siezed, and had ready to ship, awaiting their orders. It was piled

(Testimony of Ben W. Henderson.)

in the yard as designated in the contract; it was stenciled with their name as fast as the bill of sale was given; the total amount that was burned was stenciled with their name at that time. The defendant had an agent on the ground representing it in these transactions; he was Mr. L. X. Juneau. Mr. Juneau came to our mill once a month and inspected our work and made suggestions as to what we should cut and how it should be piled, and checked the yard, and all checks signed—we delivered to him a bill of sale and he signed the drafts which we collected through our bank. He was present at the time that this lumber had been turned over to them through these bills of sale on the 3d day of August, 1920. That was the date of the fire.

After we had entered into this contract on the 16th day of April, 1920, to effect a delivery of that 2,000,000 feet of lumber expressed in Exhibit 1, we shipped as fast as we received orders. A bill of sale was given and the lumber stenciled. It was in our contract to stencil the lumber at that time; they brought the stencil to us and the next day after this bill of sale was given Mr. Juneau and Mr. Dennis brought the stencil, paint and brush and asked us to do this at once; that was done on the 2,000,000 feet. Outside of the 2,000,000 feet, the rest was sawed by us under the contract.

As to the value of the 3,338,412 feet—the market price of it, in the first week in August, 1920, we have a record of the lumber which burned there

(Testimony of Ben W. Henderson.)

which we made out in order to [111—5] settle with the insurance companies. The price we reached there was reached by Mr. Juneau and I, Mr. Juneau representing the defendant at that time.

“I will say this in explanation, that on August 3d, Mr. Juneau was there at the fire, and then he went away, and he came back in the evening—I don’t know whether he got to Polson or not when he saw the fire coming, he left there just before dinner time I know, that day, and he came back, I think it was possibly the next day after the fire, the fourth, I think, of August, that he came down, and we told him we had to extend the prices on this lumber. We had to do this to settle with the Insurance Companies, that is why that was made at this time, and we asked him to come down and give us these prices that we figured out the value of that lumber, to hand the adjuster, and Mr. Juneau came down and gave the prices, and those figures I have extended.

Q. Well, what were the average prices per thousand that you and Mr. Juneau agreed on by the extension of the figures?

By Mr. POPE.—Objected to, as no foundation is laid to show the authority of Mr. Juneau to bind us by his admissions, if this is offered in the nature of admissions on our part.

By the COURT.—If it is not hereafter shown,—counsel cannot put in all his case at once,—if it is not hereafter shown to the extent that it is neces-

(Testimony of Ben W. Henderson.)

sary the evidence will be disregarded by the Court; at this time the objection is overruled.

Exception.

A. \$51.75 per thousand, average."

That was the f. o. b. price. The expense of putting the lumber from the pile at the planer on to the cars was \$2.50 a thousand; that would be substantially \$48 a thousand in the pile. The lumber was all in pile at the time it was burned. I haven't with me the total value that would be. Asked to tell the difference between the highest market price and the market price of lumber, I will say the highest market price obtainable at that time, in my judgment, would be five to seven thousand above that average. The market price is the list upon which lumber was at a certain time sold by the manufacturers; there is often quite a difference in the market value and the highest market value because of the condition of the lumber market at a specified time; at that specified time there was such a demand that a man could offer, and a great many men did secure better prices than those. Those were the prices taken from the price lists which were the regular market value at that time; then lumber sold at that time at very much higher values.

There was paid to us by these people on this 3,338,412 feet of lumber that was burned, \$20 per thousand; that was all that was ever paid on that by them to us. This lumber was insured under our contract. We had \$70,000 insurance which we

(Testimony of Ben W. Henderson.)

placed with the old line companies the time we purchased the lumber; and then we had the \$60,000 placed with the Inter-Insurance Exchange, of Seattle, Washington; that we placed later and put it on as our yard filled up. In the first place we bought 2,000,000 feet of lumber from W. H. Smead, and [112—6] when we made the purchase we insured it for \$70,000, the price we paid for the lumber. That was on the 15th day of April, 1920. That insurance policy is in the bank; I surrendered it when I made our proof of loss. There was \$20 per thousand feet made payable to Turner, Dennis and Lowry, as their interest might appear, and as our interest might appear. The rest was made payable to us as our interest might appear. This second policy for \$60,000 was taken out at intervals as the lumber increased in the yard when it was sawed. Our bookkeeper always ordered this insurance by telephone. The order was given to Mr. DeVeuve, at Seattle, Washington, telephoned or wired by our bookkeeper. There was no provision made in that policy as to payment of insurance; it was payable to Donlan and Henderson. That was absolutely unintentionally inserted in there; it never occurred to me that they were not named in it until we went to make the proof; that was an oversight.

Cross-examination by Mr. HALL.

The lumber was in pile at Fletcher Spur, Flat-head County, and right at our mill. Mr. Dennis was there and inspected the lumber; that was after

(Testimony of Ben W. Henderson.)

this contract had been signed. They paid us \$20 a thousand on it; as to whether that was an advance, I will say it was the first payment. Then we were to stencil the lumber in their name and to load it and ship it according to their instructions. When we got orders we were to plane whatever we got orders to plane. We were to plane it, load it on the car and ship it according to their orders.

We shipped them some lumber; when we made those shipments we invoiced the car, the first car that was loaded we drew on them for the amount, estimated the feet, and drew on [113—7] them for the amount, and according to our contract, and they asked us later not to do that thing, and after the first or possible the first two cars, we didn't do that. Defendant's Exhibit "B" is the invoice that accompanied the car of lumber specified therein; it was attached to a draft. That is an itemized statement of the amount of lumber in the car together with the bill for the amount. We have here "Less 15% commission," and I will explain that. The first car there, our bookkeeper was not familiar with that way of doing business and not having any counsel he deducted 15% from the whole amount, and sent that in, and Turner, Dennis & Lowry were kind enough to correct him in that; of course, that was a mistake of Mr. Ramsey. They were to have the 15% for selling; each one of them was marked, "Less 15% Commission." As a matter of fact, that is what Turner, Dennis & Lowry

(Testimony of Ben W. Henderson.)

got out of the deal, 15% commission, whatever they would sell the lumber for.

As to whether I knew what they would be able to get for this carload of lumber, the first carload of lumber, if I remember right, we had the price on that. Now, they were unable to get us very many cars, it seems, but after they finally began to give us orders—I think the first two cars of regular shipments were also put on that kind, and generally they would put up a load of orders that were transit orders, that were not desirable, but we loaded first on transit orders, which were handled in this way: they would telegraph us to ship a carload to Alliance, Nebraska; we would ship it; then they would divert it to a customer they found while the carload was enroute, collect the amount, retain the \$20 per thousand they had advanced us, retain their 15% commission, and we would get the balance. They were all handled the same way. All the lumber that was shipped by us, they were supposed to find the [114—8] purchaser, take out the \$20 a thousand and the 15%, and deliver to us the balance, less the freight.

Defendant's Exhibit "B," now admitted in evidence without objection, is an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated June 29, 1920, for 21048 feet, \$1264.66, less 15% commission, \$189.69, net \$1074.97; marked "Sold Skerritt Lbr. Co." and "Less 15% of Selling Price."

Also an invoice from Donlan & Henderson to

Turner, Dennis & Lowry Lbr. Co. dated July 1, 1920, for 28,844 feet, \$1471.04, less 15% commission \$220.65, net \$1250.39; marked "Sold to Monongahela Lbr. Co., Elwood City, Pa."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated July 10, 1920, for 25597 feet, \$1503.82, less 15% commission \$225.57, net \$1278.25; marked "Sold to Everett O. Blanvelt."

Also an invoice from Donlan & Henderson to Turner, Dennis & Yowry Lbr. Co., dated July 10, 1920, for 26,269 feet, \$1665.41, marked "Sold on consignment basis. Less 15% commission. Sold W. Y. Taylor Rutledge, Mo."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated July 10, 1920, for 28,510 feet, marked "Sold on consignment basis Less 15% commission."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated July 12, 1920, for 36937 feet, \$2114.56 marked "Sold on consignment basis of 15% commission."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated July 12, 1920, for 34,272 feet, \$1985.56, marked "Sold on consignment basis Less 15% commission." [115—9]

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated July 30, 1920, for 27699 feet, \$1218.76, marked "Less 15% commission," and "John Morrell & Co."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated Aug. 6,

1920, for 27,200 feet \$1687.57, marked in pencil "Less 15% Com." and marked "Traverse City Casket Co."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated Aug. 3, 1920, for 27,659 feet, \$1217.00, marked in pencil "Less 15% Com."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated Aug. 12, 1920, for 33701 feet, with pencil notation on attached slip "Shipped on consignment. Not yet sold. In storage at East St. Louis. 1/21/21." And sheet No. 2 of the same for 39345 feet.

By the WITNESS.—Defendant's Exhibit "C" is the letter in which, as I say, Turner, Dennis & Lowry kindly corrected the mistake of the book-keeper in regard to our method of doing business.

Defendant's Exhibit "C," then admitted in evidence without objection, is on the letter-head of Turner, Dennis & Lowry Lumber Co., and reads as follows:

Defendant's Exhibit "C."

July 6, 1920.

Donlan & Henderson,

Pablo, Montana.

Gentlemen:—

We have your three invoices of June 29th and July 1st and [116—10] are glad indeed to note that you are getting action on these orders.

We are very anxious to get everything out just as quickly as possible so that we can take advan-

tage of what cars can be obtained at this time. We wrote you to this effect just a day or two ago and sent you loading schedules in which you could load any cars that were furnished you.

We note in your letter in regard to furnishing filler for orders calling for small cars. Beg to advise that it will be agreeable on any order which we send you to increase or decrease the items proportionately to fit the equipment that is furnished you. Of course try to secure a car which will fit the order but if this is not possible you may, as above stated, either increase or decrease proportionately but do not increase all of one item at the expense of others or decrease all of one item without decreasing the other items proportionately.

We note that you have credited us with 15% of the delivery price. Our contract anticipated 15% of the f. o. b. mill net price so you are giving us credit for more than we have coming on those shipments. We are figuring the estimated weight on these invoices and charging you with 15% of the amount of your invoice less the estimated freight. This is only a memorandum charge and as soon as the freight bills come in, the 15% charge will be corrected either higher or lower depending upon whether the actual freight overruns or underruns the estimated freight.

We judge that this is an oversight on your part and thought best to explain this to you before

(Testimony of Ben W. Henderson.)

other shipments had come forward.

Yours very truly,

TURNER, DENNIS & LOWRY LUMBER CO.

THOS. S. DENNIS. [117—11]

By the WITNESS.—That was a correction made thereafter, and it wouldn't matter what price Turner, Dennis & Lowry sold the lumber for, they remitted to us the purchase price, less the cost of freight set forth, less their \$20 a thousand they had advanced, and less the 15% commission which they got for selling. When they accounted to us and made these returns, for each car they would send a statement after the form of Defendant's Exhibit "D."

Defendant's Exhibit "D," then admitted in evidence without objection, is upon the letter or form head of the defendant, is dated Nov. 27th, 1920, and reads as follows:

Defendant's Exhibit "D."

Donlan & Henderson,

Pablo, Montana.

Gentlemen:

Herewith please find final settlement:

On Car PRR. No. 87426 Your invoice..\$1,264.68

On Account:

Check \$359.15

Disc. \$ 7.33

\$366.48 Total advance payment..\$ 366.48

Balance...\$ 898.18

(Testimony of Ben W. Henderson.)

Final Settlement:

Freight 34,906 lbs. 77.....\$ 338.94

Excess freight charges per

Form No. 2.....

War tax.....

Demurrage....

Reconsignment... ..

[118—12]

Change of consignee.....

15% commission..... \$ 138.93

Credit their account \$20.00

Per M on 21,048 ft.....\$ 420.96

Discount.. ..\$ 8.41

Checks enclosed..... \$ 8.41

Overpaid.. .. \$ 8.61

\$ 906.79 \$ 906.79

Yours truly,

TURNER, DENNIS & LOWRY LUMBER CO.

The hour of noon having arrived, the Court suspended until 1:30 o'clock P. M., at which time the trial and the cross-examination of the witness Ben W. Henderson was resumed.

By the WITNESS.—When we had cut some more lumber after the last bill of sale was given Mr. Juneau would come and invoice it, and then we would give him a bill of sale and he would give us a draft for \$20 a thousand; that would be the \$20 a thousand that was agreed between Dennis and us

(Testimony of Ben W. Henderson.)

that they were to give us; that was done once a month between the first and the tenth, and the name of Turner, Dennis & Lowry was put on in stencil on the piles. Then when we got the order from Turner, Dennis & Lowry we put this lumber through the planer and loaded it on the cars and shipped it to their order, and they held out \$20 a thousand that they had advanced us or paid us, held out their 15% commission and remitted the balance to us; that was the way we were doing business up to the time of the fire.

We got two million feet we bought from Smead; that Smead cut compared with the lumber we cut before June 28th, in quality, about on an average—near somewhere the same quality of logs; the million and a half that we cut was about the same [119—13] quality as the two million we bought from Smead. We paid Smead \$35 a thousand for that lumber. We had \$130,000 total insurance at the time of the fire; \$70,000 of that was in the old line companies; I couldn't recall their names; the Palatine was one—it was all written with Schlick & Gage—and the Firemen's Fund was one and the British Company. These policies ran to Donlan & Henderson and to Turner, Dennis & Lowry as their interest might appear. The \$60,000 in the Inter-Allied Insurance people, in Seattle, Washington, ran straight to Donlan & Henderson.

Defendant's Exhibit "E" is a statement of account made by our Mr. Rapp and Mr. Keith for Turner, Dennis & Lowry, and I believe delivered to

(Testimony of Ben W. Henderson.)

Mr. Lowry. I take it that showed the state of our account at the time that was made, as our books showed it; I don't do that part of the work myself and you will have to get that information from Mr. Keith if you want any detailed information about it.

(By Mr. PARSONS.)

Q. Was this instrument, Defendant's Exhibit "E," a compromise offer on your part, after the controversy arising in this case?

A. That was issued to Mr. Lowry at a time when Mr. Lowry was here, and trying to make a compromise rather than go to court; that was a compromise proposition.

Cross-examination (Resumed).

By the WITNESS.—Mr. Lowry and ourselves were endeavoring to adjust our differences and settle up and our bookkeeper rendered this as a statement of the account that, I presume, our books showed at that time. That is Mr. Ernie Keith's writing; he is our head bookkeeper. When this statement was made and we were trying to come to some understanding that was written for the basis of settlement. I was there when this was handed to Mr. [120—14] Lowry. I knew what was written on the bottom here in regard to any corrections; I am familiar with it.

Defendant's Exhibit "E," then admitted in evidence over objection, is in words and figures as follows:

Turner, Dennis and Lawry Co.

Defendant's Exhibit "E."

Turner, Dennis and Lowry Co.

IN ACCOUNT WITH DONLAN & HENDERSON.

11/23/20

1920

Debits Credits

Note dated 4/15/20 due 7/16/20

7% 10,000.00

Note dated 4/15/20 due 8/16/20

7% 10,000.00

Cash 4/15/20 40,000.00

Note dated 6/28/20 due 9/1/20

8% 6,082.24

Note dated 6/28/20 due 10/1/20

8% 5,000.00

Cash 6/28 17,835.52

Cash 6/28 to apply on notes.... 8,917.76

Cash 8/4 8,932.72

Cash 8/4 to apply on notes..... 4,466.36

Jan. 29. Car 87426 Penn. our order #1

21038 ft. @ 20.00 apply on ad-
vance 420.76

July 1. Car 75494 N. H. our order No. 2

28844 ft. @ 20.00 apply on ad-
vance 576.88

July 1. Car 37558 B. & O. our order #3

25597 ft. 20.00 apply on ad-
vance 511.94

July 9. Car 38703 I. C. our order #4

26269 ft.....1665.41

Less frt. 47000# 57¢..... 267.90

1397.51

Less 15% 209.63 1,187.88

July 10. Car 40368 B. & M. our order #5

28510 ft.....1630.53

Less frt. 52100# 57¢..... 296.97

1333.56

Less 15% 200.03 1,133.53

July 12. Car 155093 R. I. our order #7

36937 ft.....2114.58

Less frt. 61300# 74¢..... 453.62

1660.96

Less 15% 249.14 1,411.82

Turner, Dennis & Lowry Lumber Co. 153

1920		Debits	Credits
July 12.	Car 56461 N. Y. C. our order #6		
	34272 ft.....	1985.56	
	Less frt. 59200# 75.....	444.00	
	.....	1541.56	
	Less 15%	231.23	1,310.33
July 30.	Car 130074 Soo. our order #8		
	27699 ft.....	1218.76	
	Less frt. 53100# 57.....	302.67	
	.....	916.09	
	Less 15%	137.41	778.68
[121—15]			
Aug. 1.	Car 61665 N. & W. our order #9		
	27200 ft.....	1687.57	
	Less frt.....	309.00	
	.....	1378.57	
	Less 15%	206.79	1,171.78
	Totals	21,887.72	97,850.48
1920	Totals	21,887.72	97,850.48
Aug. 2.	Car 558814 Penn. 27659 ft.....	1217.00	
	Less frt. 53760# 57.....	306.43	
	.....	910.57	
	Less 15%	136.59	773.98
	Discount on dfts. 4/15.....	177.80	
	Cash 10/4	60,000.00	
	699972 ft. Nov. finished piles		
	20.00	13,999.44	
		96,838.94	97,850.48
			1,011.54

This statement was made in a hurry and we cannot guarantee that it is absolutely correct, but we believe that it is approximately so. Any error therein may be easily corrected. The statement does not include the computation of interest on advancements or loans made by Turner Dennis Lowry Lumber Co., nor on the repayments or credits of

(Testimony of Ben W. Henderson.)

Donlan & Henderson. This computation can easily be made at any time. And it does not include any adjustment for car #78,564 U. P. our order #11, Aug. 6, 1920, nor the expense bills of any shipments heretofore made. We also call your attention that all notes held by you against us have been paid and we ask that you return same to us promptly.

By the WITNESS.—The first of the insurance money was collected, I think, on September 29th, or thereabouts; the other was some time in the latter part of October; we collected seventy thousand on September 29th; that was from San Francisco. There was sixty thousand we collected later and I think that was all paid in October; I wouldn't be positive as to the date; it is possible that it was paid on October 26th and that the final draft was [122—16] issued from Seattle. That is my signature on the proof of loss attached to the deposition of Earl DeVeuve, made to the Inter Insurance Exchange of Seattle; that is my partner Mr. Donlan; I recognize the signatures all right; no doubt that is correct. Those are the signatures of Mr. Donlan and myself on the Articles of Subrogation attached to the deposition of Earl DeVeuve. They were signed by us and sent to the insurance company at the time this sixty thousand dollars was paid us; there are two of them. I have before seen the letter marked Defendant's Exhibit "F," and that is my signature.

Defendant's Exhibit "F," then admitted in evidence over objection, and one paragraph of which was then read, is as follows:

Defendant's Exhibit "F."

(Letter-head of DONLAN & HENDERSON.)

Pablo, Montana, August 30, 1920.

Mr. Thos. S. Dennis,

c/o Turner, Dennis & Lowry Lumber Co.,

New York Life Bldg.,

Kansas City, Mo.

Friend Mr. Dennis:

Yours of the 23d inst. received and in response will say that I regret very much to learn that you have not been well, but glad to know that you have recovered and shall look forward with much pleasure to the time when you will visit us, and hope that your plans are to bring Mrs. Dennis with you.

We built a shack in the camp and my wife and children have proven themselves pioneers; they enjoy the change.

Would have written you long ago, but from the fact that Mr. Juneau was here at the fire, I had presumed that you had received a detailed report. The fire was at first noticed at 12:45 P. M. on August 3d in a pile of 1x6 about one hundred feet [123—17] from the railroad track and about three hundred feet from the mill; the pile in which the fire started was about forty courses high; there was a high pile on one side, the other three sides being vacant, therefore it was a very favorable place to fight it. There was two barrels of water within one hundred feet, we had a wagon tank of water there within ten minutes, also hose from the pump at the mill. I drove to Pablo and got three fire

(Testimony of Ben W. Henderson.)

extinguishers and with these efforts and plenty of willing men, we held it in that pile for an hour before it reached another pile. Then all that we could do was to turn our attention to the mill and woods. We saved the mill and got the woods fire under control after it had burned through about a million feet of logs. We think that we will have seventy-five per cent of salvage in these.

We had no insurance on logs, had \$130,000 on lumber. Our figures show that we were \$35,000 underinsured on lumber. The adjusters made no protests. We have filed our proofs of loss and should be getting some money soon. There can be no question about the origin of the fire in my judgment. A spark from a locomotive which passed here at 11:30 set the fire.

We lost but two days with the mill, have a nice little start made towards another yard. Labor is scarce but have been able to keep going so far; this is the threshing season and I think that we will have plenty of help within the next two or three weeks.

With kind regards from myself and Mrs. Henderson to yourself and Mrs. Dennis, I am

Yours respectfully,

BEN W. HENDERSON.

By the WITNESS.—As well as I remember there was about five hundred thousand [124—18] feet of lumber in the yard that was destroyed by fire that you have not advanced \$20 a thousand on. How long it would have taken us to have worked

(Testimony of Ben W. Henderson.)

that lumber out and loaded it on the cars and shipped it out would entirely depend on how urgent the necessity was, and we could have loaded it very quickly if conditions had warranted; if we had the order to do it and they asked us to do it quickly we could have done it. The capacity of our planer at that time for one shift was thirty-five to forty thousand; of course if it had been necessary we could have put on two shifts and doubled it.

Redirect Examination by Mr. PARSONS.

When I used the word "we" in Defendant's Exhibit "E," when I say "we were underinsured" and "we didn't have any," I referred to Donlan & Henderson. The capacity of our planer, double shift, was about seventy-five or eighty thousand. You load from twenty-five to thirty-five thousand in a car. I would say there was a million feet of this lumber ready for shipment May first; by June first there would have been another million; and by July first the remainder. We didn't ship this lumber out before the four or five cars between August 3d and August 16th because we had no orders to ship any faster than we shipped. The condition of the market was good and in fact it was a runaway market. I have been in business twenty-five years. I think ten days to two weeks would be the time required for a lumber salesman to sell that lumber at any period from May first to August 3d. This \$35 a thousand which we paid for it was about seventeen or eighteen dollars under the actual market value

(Testimony of Ben W. Henderson.)

of lumber at the time we bought it; we expected to make a profit when we bought it. Adverting to the claim in the complaint of \$13,999, after the fire we sold to the defendant [125—19] other lumber and gave them bills of sale therefor. Plaintiffs' Exhibit 6 is the bill of sale we gave them for the lumber, and the amount therein stated is accurate.

Plaintiffs' Exhibit 6, then admitted in evidence without objection, is a bill of sale from Donlan & Henderson, conveying to Turner, Dennis & Lowry Lumber Company, for a consideration of \$13,999.44, 699,972 feet at \$20 per M, said lumber being in Flathead County, Montana.

By the WITNESS.—They did not pay us for that; their draft was turned down. We received from them this letter of the defendant, dated November 17th, 1920.

Plaintiffs' Exhibit 7, then admitted in evidence without objection, is a letter on the letter-head of the defendant company, addressed to Donlan & Henderson, Pablo, Montana, and reading as follows:

Plaintiffs' Exhibit No. 7.

Gentlemen:

We have your letter of November 6th, confirming your wire of the same date, with reference to the insurance money.

Since receiving this we have exchanged several wires with Mr. Juneau, and it is, of course, needless to go into details in regard to these.

We regret that it has been necessary for us to be so insistent in regard to the recovery of this money, but as we have explained to you previously, and several times through Mr. Juneau, we obligated ourselves to take up a note at the bank in the amount of \$25,000 anticipating that we would have all of the insurance money in our possession by that time.

When the money did not arrive and we had insistent assurances from the Insurance Company that the \$20,000 of the money [126—20] had been sent to you, we kept holding the bank off from day to day expecting every day that the money would be forthcoming in the next mail. You can readily imagine the embarrassment and the serious situation in which we found ourselves when we learned that the money had been received by you and given for your own needs.

Of course, the writer appreciates just exactly how urgent were your own requirements having gone through this matter with you before, but this is one place where we believe that our claim was entitled to prior consideration. We were entitled legally to the first returns from the insurance money until our claims were liquidated, but in spite of this we permitted you to use \$20,000 of the first receipts from the Old Line Companies and the Inter-Insurance Exchange, knowing that it was necessary for you to have some funds to resume operations after the fire, and to cover the time before we could make our next advance. However,

we have made all of our advances very promptly to you, and on two or three occasions when it has been necessary for you to have additional funds we have gone deep down into our pockets and advanced you some that was not justified by the contract nor the market conditions.

It was very embarrassing for us to have turn down Mr. Juneau's draft for your November advance, but as we advised Mr. Juneau in our wire it was absolutely impossible for us to take this up without making some adjustment of the amount which we had promised the bank.

We thought if you would permit us to deposit sight draft against you for the \$20,000 that this would enable us to straighten matters up with the bank, and we could then go ahead and arrange for our finances on the \$14,000 draft, but when you failed to wire us authority to make the deposit of the sight [127—21] draft you left us high and dry again.

We are now waiting for some definite advice from Mr. Juneau before we can proceed. Of course, we will take up this draft just as soon as we can get these matters straightened out, and we can only trust that you will appreciate the situation with us and not misunderstand the holding which made it necessary for us to return this draft.

Mr. Juneau advises us that you are hurt, and disappointed because we have not sent you the notes which you gave us for money which we had advanced to you; furthermore that you were hurt at

our attitude in regard to the subject to our holding the insurance policies.

With reference to the notes, we cannot understand why you should take exception to our holding these notes, when they have not been paid. You owe us some \$36,000 plus up to the 1st of October which amount is still past due, and the notes which we hold from you do not total this amount. It is true that you paid us \$60,000 of insurance money, but your total indebtedness to us was somewhere in excess of \$95,000, and we can see no reason why you should take exception to our holding these notes when the amounts have not been paid. You may rest assured that just as soon as the balance due on the adjustment which the writer made with Mr. Henderson when in Pablo last month, has been taken up, that these notes will be returned to you.

With reference to the insurance, the writer took the precaution of going into this matter most fully with both Mr. Donlan and Mr. Henderson, when he was in Montana last month, and at that time we all seemed to be in perfect accord. We do not know of any commercial activity where insurance is carried on property, or possession that are mortgaged, or against which an assignment has been made, but what the insurance policies are [128—22] held by the parties holding the mortgage, or in whose favor the assignment is made. If you will try to borrow money on a house, you will invariably be required to insure the house for certain sums in favor of the parties lending you the money, and they will invariably insist upon

your putting up the policies. There is no reflection upon your integrity or good intentions in this, but simply a cold-blooded business proposition. We are advancing certain sums of money to you, which are supposed to be protected by insurance in our favor, and we would be very poor business men indeed, if we did not insist upon having conclusive evidence of proof in our possession that our interests were protected.

The trouble that we are now having adjusting this old insurance matter should be sufficient evidence of the errors and mistakes which can creep in, as had these insurance policies been in our possession we would have immediately discovered that there was no loss payable clause in our favor inserted in these policies, and we would, of course, have insisted upon having this corrected. Aside from this, we are carrying large sums of money as advances on lumber stocks, and are able to obtain financial assistance from the bank on the assumption that these advances are fully protected by insurance. Where we cannot display policies to them properly covering our interests it naturally weakens our position with them from a borrowing standpoint.

On practically every operation that we are interested in, such as yours, we insist. not only in carrying the insurance policies in our possession, but on placing the insurance as well, not being willing to leave this to the manufacturer, as he is too busy, as a rule, with other details to give serious thought to the matter of insurance. In your case we made an exception, knowing that Senator Don-

lan had a good many friends [129—23] in the insurance business that he would like to favor, and only reserving the privilege of retaining these policies in our possession.

We have previously stated that we do not wish to be unreasonable nor arbitrary about this matter, but we do think that we are entirely within our rights, and are asking nothing unreasonable from you, and we insist that you let us retain these policies.

I have urged Mr. Lowry to go into this matter with you fully when he calls on you, as we want you to know that there is nothing personal about this, but simply a desire on our part to make this transaction as nearly one hundred per cent perfect business arrangement as can be affected.

We feel that we can be of a great deal of service and benefit to you, and that you can likewise serve us in an equal capacity, but we must have a frank and complete understanding about matters of this nature, as we will never get any place if we are constantly irritated with one another. and fighting at cross purposes.

Will you please take the time to give this matter serious consideration, and then sit down and write us a letter with all hurts and feelings of injustice eliminated, and let us see if we cannot get together on this matter of insurance without personalities creeping in?

We are very much in hopes that by the time this letter reaches you that you will have arranged to take care of the \$20,000 item, and also that you will

(Testimony of Ben W. Henderson.)

be in position to favor us with settlement on the balance of the money due us, under our agreement and settlement made last week.

Awaiting further advice, and with personal regards to you all from the writer, we beg to remain, [130—24]

Yours very truly,

TURNER, DENNIS & LOWRY LUMBER
CO.

By the WITNESS.—This was an advertence to the same \$13,999, plus, that we have just been talking of.

By Mr. PARSONS.—In that connection, I wish to introduce in evidence the last clause in paragraph 8, of defendant's fourth counterclaim, which reads as follows, "But that said sum has not been paid nor any part thereof, save and except the sum of \$60,000 paid to the defendant by the plaintiffs on the 2d day of October, 1920, and there still remains due and owing to the defendant from the plaintiffs on account of the money collected from insurance upon said lumber as aforesaid, the sum of \$15,398.45, together with interest thereon at the rate of eight per cent per annum from the 1st day of November, 1920, less the sum of \$13,999.44 credited to plaintiffs by the defendant as hereinafter alleged.

By the WITNESS.—Instead of paying us this money they claim to have credited it on our account.

By Mr. PARSONS.—And to the same effect, I wish to introduce, if your Honor please, the last clause in paragraph 9 of the same count, count num-

(Testimony of Ben W. Henderson.)

ber 4, of their counterclaim, which reads as follows: "the sum of \$13,999.44 was loaned on the 8th day of November, 1920. on 699972 feet of lumber by defendant's then crediting to the plaintiffs that [131—25] sum of money as a payment upon the said sum of \$15,398.45 then due the defendant from the plaintiffs."

Recross-examination by Mr. HALL.

As to whether we had trouble getting cars, when we first put in an order for cars we experienced a little trouble because of the embargo that was on cars at that time, and we first had to ascertain what cars could be loaded for those points, and after we got that adjusted, after the first two days, and what the intention of the order, we had no difficulty in getting cars. I recognize the signature upon Defendant's Exhibits "G," "H" and "I" as that of Mr. Rapp, who was our bookkeeper. These are all in relation to shipping orders.

I don't know how long we were delayed on account of the blower, but it seems to me a week or ten days; we had some trouble in getting parts for that boiler at that time, in fact, it was ordered, and we didn't shut down for a few days, the stuff was all there. and then when it come, they lost the separator, and couldn't locate it on the railroad, and had to make another one, and it seemed to me a long time—I think a week or ten days. This letter of July 2d contains instructions about when we ship the car, we ship and then tell them where we ship it,

so that they would divert it to the customer when they found one.

Defendant's Exhibit "G," then admitted in evidence over objection, is from the defendants to the plaintiff, dated June 22, 1920, and reads as follows:

Defendant's Exhibit "G."

We are in receipt of your orders: Your Nos. 616-B, 616-D and 618-A for which we thank you very much. [132—26]

We will give these orders our immediate attention, but are having trouble getting cars at the start; however we will advise you, should anything handicap us altogether. The embargo in some parts of the East seems to still be in force.

Defendant's Exhibit "H," then admitted in evidence over objection, is a letter from Turner, Dennis & Lowry Lumber Co. to Donlan & Henderson, dated July 2, 1920, and reads as follows:

Defendant's Exhibit "H."

Gentlemen:

We have your favor of June 22d, acknowledging our order numbers 616-B, 616-D and 618-A. We note that you give these orders your immediate attention, but are having trouble in getting cars. This is a subject which we wish to take up with you, as we believe that the whole lumber situation during the next four or five months will hinge upon the car situation. Cars are already tight everywhere, and will undoubtedly get even more tight later on. If there is any pressure that you can bring to bear

that will enable you to secure cars, believe that you certainly ought to do so, as it is going to be very difficult, even at the best to get all of the stock shipped, within the next six months that can be marketed.

We are enclosing a memorandum of standard loading covered by items #1 to 11, and would suggest that you put this on file in your shipping department and whenever you are able to secure a car of any kind, and have no other orders from us on which to load, load one of these assortments, which ever one of these assortments suits your stock to best advantage. As soon as you start loading one of these assortments, wire us at our expense, giving us car number, and advising what item number you are loading, and we will wire you destination. We believe that this [133—27] will enable us to take advantage of all possible equipment which we can secure and is the only way we can get by with the car situation as it will likely be the next several months.

It is imperative that you wire us when you start loading one of these assortments, so we can instruct you where to ship it, and trust that you will not fail to do this. We have tried to make up standard assortments which would fit your stock and will take care of any others items which accumulate by special orders from time to time. We would like to have all dimension dressed 4 sides if it is possible for you to work it in that manner, but if necessary the Dimension may be dressed side and edge. Do not mix the two different workings in any shipment,

in other words, all the dimension in any one car must be either side and edge or four sides.

You will note that we have given you permission to load either White Pine or Fir and Larch on both of these assortments. In loading this, however, be sure to load only one character of wood in the car, in other words, if you are loading White Pine, boards, all of the 1" common must be White Pine, as if you mix White Pine and Fir & Larch, it would kill the advantage which we would gain in selling the White Pine at a higher price. This only applies to the common, as it is alright to mix White Pine Common with Fir & Larch uppers.

We are going to need your co-operation in the way of getting cars to enable us to get all of this stock marketed while the price is attractive, and trust you will do everything within your power to secure an amply supply of equipment.

Defendant's Exhibit "I," then introduced in evidence over objection, is a letter from Donlan & Henderson to Turner, Dennis & Lowry Lumber Co., dated [134—28] July 24th, 1920, and reading as follows:

Defendant's Exhibit "I."

Gentlemen:

We are in receipt of your letter of the 20th inst. asking for acknowledgment of your order No. 701-J of July 8th.

This order was evidently somewhat delayed in the mails as we received it on the 16th and acknowledged receipt on the 17th together with four invoices enclosed your orders Nos. T-701-L, T-701-N,

(Testimony of Ben W. Henderson.)

T-701-M and T-701-K. Kindly advise whether or not you have received these.

We also called your attention to the fact that we would be shut down for a few days to install a blower, and as a matter of fact have been shut down longer than we expected because of a delay in receiving some blower parts. However we plan on starting to plane again Tuesday, July 27th and have ordered cars accordingly. Will wire you the car and order that we start on.

In the future we shall endeavor to advise acknowledgment of orders received, by separate letter, by return mail. And we think that it will be continuous shipping from now on as we anticipate no shut down except a possible short delay in installing our matcher when it arrives, which is an indefinite date.

Redirect Examination by Mr. PARSONS.

We were not troubled with having too few cars when we got orders except as I stated when we first received orders; the first order we received for shipment on the 28th day of June, we had asked for orders, and I think I read a letter last night where we asked for orders on the 9th, and insisted on getting orders right away. April 16th was the date of the contract, and I think the first order was received the 28th of June, nearly two months later; we couldn't order cars until we had the order a few days. As a lumber salesman with an experience [135—29] of 35 years, I think I could have sold all of this lumber in two weeks' time.

(Testimony of Ben W. Henderson.)

Recross-examination by Mr. HALL.

Exhibit "G," in which I said, "Gentlemen:
* * * we will give these orders immediate attention, but we are having trouble getting cars at the start * * *," was written June 22d. That is the first car we had ordered; that is what I say, at that time we had some trouble.

Witness excused.

Testimony of J. P. Lansing, for Plaintiffs.

J. P. LANSING, a witness called on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is J. P. Lansing; I am 57 years old; and my business is manufacturing lumber, in which business I have been for 35 years. I am now Sales Manager of the Polleys Lumber Company, which position I have occupied for 10 years.

I would fix the market price of lumber in 1920 by looking up our records, as to our sales at that time, and compare them with the sales made by other manufacturers. There is always a variation between the going price of lumber and the highest price. Explaining the difference between the highest market price and the ordinary or current market price—the going market price of lumber I take to be the average selling price by those who are manufacturing lumber and putting it on the market, whereas the conditions of the lumber market very frequently are such that it is possible to get more

(Testimony of J. P. Lansing.)

than the average price for lumber which you have to market. There are always variations, as a rule, between different manufacturers, from high to low [136—30] points. The variation between the highest market price and the ordinary or current market price of lumber depends entirely on the grade of lumber; on the low grades 51¢ or a dollar it might be, but on the higher grades of lumber ten or fifteen dollars possibly would not be too much. There was very little variation in the prices of lumber, the highest market price and the current or ordinary market price, between May 1st, 1920, and September 1st, 1920. On possibly one or two items it might have commenced to show a slight decrease, but on others there was a stiffening to make up for that. There was a stiffening of prices on the better grades of lumber, number one and better. At that time, I should say there was about \$10 variation. The general market didn't change much but there were sales made at higher prices in August and September. I never saw the character of the market any better, as far as the sale of lumber was concerned, from May 1st to September 1st, 1920; I would call it a good, stiff, steady market; it wasn't a runaway market at that time.

I have a copy of the bill of particulars which Mr. Donlan gave me; I have gone over that list of lumber as shown by the plaintiff's bill of particulars. I have extended the prices there, and examined the character of the lumber and the grades therein detailed, as stated on the list. There was a market for

(Testimony of J. P. Lansing.)

this lumber between the first day of May, and the first day of September, or the first day of August, the character of lumber that is indicated by plaintiffs' bill of particulars; that market was stiff; it was absorbing all that the buyers could get. In our own business we had an extensive milling and lumbering operation; I should say during that period the demand was fully equal to the supply. Taking this plaintiffs' bill of particulars, I think I could have sold that lumber between May [137—31] 1st and August 15th or September 1st, 1920. It would not have taken me over 30 days to sell it on the market at the prices I was going to fix on it, that is, from the period from May 1st to September 1st.

I would say that the highest market price available for the lumber enumerated in the bill of particulars Plaintiffs' Exhibit 8, as it was in the piles or as it was f. o. b. Fletcher Spur, in Flathead County, on the Indian Reservation, on August 3, 1920, was \$51.51; that is the result of my calculations and estimate. That is the amount in the pile. I would say that there was, from April 16th to the last of August, no variation in the price for the same character of lumber in pile in the same place, but during September, especially the latter part of September, some of the lower grades commenced to decline a little. That was due to the high freight rates principally.

Cross-examination by Mr. HALL.

The freight rates went into effect August 28, 1920;

(Testimony of J. P. Lansing.)

nobody knew what they were going to be, but they knew they were going to be advanced. The price of lumber was fixed by each individual operator that had it to sell. The larger operators got out a scale of prices, as individuals only. They are not, as a rule, very close together or very much alike. They all get out these discount cards monthly; we don't get one out every week; I don't know what the other people do. That is one way that the general trade familiarize themselves with the change in the prices of lumber. The discount card gotten out by the Weyerhaeuser Company and shown me by counsel, is the general way in which that particular organization only keeps track of the price of lumber. Some of the little millers follow that pretty well, and some don't. We do not, entirely. Between May [138—32] and September, as I remember it, our sales were equal to our cut. The lumber market reached the peak, I could say, in February, 1920. It then stood still for quite a while, up practically the time the new freight rates went into effect, August 28th. As a matter of fact, it had broken but very little before the first of August. I don't understand that it was a falling market from the first of August on. I know the Mann Lumber Company; I have not seen any of their discount sheets recently; I have at some times. They stand all right as a lumber manufacturing company. Their discount sheets are entitled to some credit to reflect their ideas as to the market, only.

(Testimony of J. P. Lansing.)

Redirect Examination by Mr. PARSONS.

The Polleys Lumber Company would not have been willing to pay this price for that lumber between May first and September first, that I fix, as it lay up there in that place, because we had plenty of lumber of our own. It could have been sold if we had no other lumber to sell.

Recross-examination by Mr. HALL.

I can't answer what it would have cost to plane it and load it in the cars up there, because I am not familiar with that operation up there.

Plaintiffs' Exhibit 8, then admitted in evidence over the defendant's objection that no proper foundation was laid, is in words and figures as follows:

Plaintiff's Exhibit No. 8.

(Priced by Joe Lansing. F. O. B. Pile. Average \$51,516.) [139—33]

Before 8/3 advanced on,				Feet	
817	pcs. 1 x 4—14	No. 1 & 2 Com.	45.00	3,813	171.58
781	—16	"	47.00	4,165	195.76
314	1 x 6—10	"	46.00	1,570	72.22
1093	—12	"		6,558	301.67
1094	—16	"	48.00	8,752	420.10
[139—33]					
83	1 x 8—8	"	46.50	443	20.60
226	—10	"		1,507	70.08
1229	—12	"		9,832	457.19
2877	—14	"		26,852	1248.62
5341	—16	"		56,970	2649.15
39	1 x 10—8	"	47.00	260	12.22
410	—12	"		4,100	192.70
482	—14	"	47.00	5,623	264.28
2940	—16	"		39,200	1842.40
22	1 x 12—8	"	48.00	176	8.45
159	—10	"	51.00	1,590	81.09

887	—12	“		10,644	542.84
511	—14	“	49.50	7,154	354.12
5109	—16	“	48.00	81,744	3923.71
#2	1 x 4 to 12—18 & 20 ft.		46.50	18,005	837.23
	All widths	10" 1"		1,675	77.89
	“ “ & lengths	1"		71,468	3323.26
566	pes. 1 x 4—10	No. 3 Com.	33.00	1,887	62.27
766	—12	”		3,064	101.11
1628	—14	“		7,597	250.70
539	1 x 6—10	“	36.50	2,695	98.37
997	—14	“		5,982	218.34
806	—14	“		5,642	221.26
1856	—16	“	37.50	14,848	956.80
203	1 x 8—8	“	34.50	1,083	37.36
376	1 x 8—10	“	37.50	2,507	94.01
1319	—12	“		10,552	395.70
192	—14	“		1,792	67.10
8955	—16	“		95,520	3582.00
50	1 x 10—8	“	34.50	333	11.49
514	—12	“	37.50	5,140	192.75
1207	—14	“		14,082	528.08
3114	—16	“		41,520	1557.00
40	1 x 12—8	“	38.00	320	12.16
197	—10	10	39.00	1,970	76.83
474	—12	“		5,688	221.83
1168	—14	“	38.00	16,352	621.38
7009	—16	“		112,144	4261.47
23	1 x 10—18	“	37.50	345	12.94
	Mixed widths and lengths 1"		37.50	8,177	306.64
No. 4 Boards			30.00	50,341	1510.23
No. 5 “			21.00	15,965	336.27
144	pes. 2 x 4—12	No. 1 Com.	49.00	1,152	56.45
367	—14	“		3,425	167.83
736	—16	“	51.00	7,851	400.40
114	—18	“	49.00	1,368	66.73
19	—20	“		253	12.40
8	2 x 6—10	“	50.00	80	4.00
169	—12	“		2,028	101.40
175	—14	“	50.00	2,450	122.50
725	—16	“	52.00	11,600	603.20
62	2 x 8—10	“	50.50	827	41.76
192	—12	“		3,072	155.14
290	—14	“		5,413	273.36

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1093	—16	“		23,318	1177.56
94	2 x 10—12	“	51.00	1,880	95.88
113	—14	“		2,637	134.49
356	—16	“		9,493	484.14
24	2 x 12—10	“	55.00	480	26.40
79	—12	“		1,896	104.28
95	—14	“	53.50	2,660	142.31
[140—34]					
429	—16	“	53.50	13,728	734.45
	2 x 6 to 12 asst. lengths		50.00	10,294	514.70
	1 x 4 Selects, C and better		79.00	131,787	10411.17
	1 x 6 “ “ “			78,235	6180.57
	1 x 8 “ “ “			50,683	4003.96
	1 x 10 “ “ “	83.00		43,510	3611.33
	1 x 12 “ “ “	89.00		8,112	721.97
	1 x 13 & wider, select, C & better	94.00		10,337	791.68
	1" mixed widths and lengths select, C & better	79.00		16,659	1316.06
	1 x 4—16 selects, C & better			1,877	148.28
	2" mixed widths and lengths selects, C & better	82.00		7,072	579.90
	4/4 Factory, C & better	73.00		85,538	6244.27
	5/4 “ “ “	80.00		2,763	221.04
	5/4 No. 1 Shop	75.00		8,287	621.53
				<hr/> 1,338,412	<hr/> \$72851.39
				<hr/> 1,338,833	
591 Pes. 1 x 4—12 No. 1 & 2 Com.		45.00		2,364	106.38
1281	—14	“		5,978	269.01
1457	—16	“	47.00	7,771	365.24
1644	1 x 6—12	“	46.00	9,864	4537.74
1824	—14	“		12,768	587.33
5017	—16	“	48.00	40,136	1926.53
1946	1 x 8—12	“	46.50	15,568	723.91
2371	—14	“		22,130	1029.00
9092	—16	“		96,980	4509.57
1746	1 x 10—12	“	47.00	17,460	820.62
1092	—14	“		12,740	598.78
6627	—16	“		88,360	4152.92
805	1 x 12—12	“	51.00	9,660	492.66
1126	—14	“	49.50	15,764	780.32

10705	—16	“	48.00	171,200	8221.44
	8 & 10 ft.		45.00	21,680	975.60
1471	1 x 4—12	No. 3 Com.	33.00	5,844	194.17
2501	—16	“	34.00	13,339	453.53
1541	1 x 6—12	“	36.50	9,246	337.48
1327	—14	“		9,289	339.05
4391	—16	“	37.50	35,128	1317.30
1289	1 x 8—12	“		10,312	386.70
1104	—14	“		10,304	386.40
6253	—16	“		66,485	2493.19
1183	1 x 10—14	“		13,802	517.58
4060	—16	“		54,133	2029.99
830	1 x 12—12	“	39.00	9,960	388.44
1119	—14	“	38.00	15,666	595.31
5545	—16	“		88,720	3371.36
	Mixed 19 & 20	“	37.50	18,180	681.75
	“ 8 & 10	“	34.50	5,025	173.36
	No. 4 Boards		30.00	207,539	6226.17
1838	2 x 4—12	No. 1 Com. Pine	49.00	14,704	720.50
2326	—14	“		21,709	1063.74
8218	—16	“	51.00	87,658	4470.56
12	—18	“	49.00	144	7.06
1	—20	“		13	.64
9	2 x 6—10	“	50.00	90	4.50
1082	—12	“		12,984	649.20
1962	—14	“		27,468	1373.40
[141—35]					
7133	—16	“	52.00	114,128	5934.66
82	—18	“	50.00	1,476	73.80
78	—20	“	50.00	1,560	78.90
19	—24	“		456	22.80
4	2 x 8—10	“	50.50	53	2.68
707	—12	“		11,312	571.26
1016	—14	“		18,966	957.78
3240	—14	“		69,120	3490.56
236	—18	“		5,664	286.03
20	—20	“		533	26.92
10	—24	“		320	16.16
2	2 x 10—10	“	51.00	33	1.68
338	—12	“		7,760	395.76
488	—14	“		11,387	580.74
1094	—16	“		29,173	1487.82
312	—18	“		9,360	477.36

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89	—20	“		2,967	151.32
8	—22	“		294	14.99
6	—24	“		240	12.24
2	2 x 12—10	“	55.00	40	2.20
166	—12	“		3,984	219.12
280	—14	“	53.50	7,840	419.44
1359	—16	“		43,488	2326.61
156	—18	“	55.00	6,616	308.88
23	—20	“		920	50.60
6	—22	“		264	14.52
7	—24	“		336	18.48
6	2 x 14—16	“	53.50	224	11.98
4	—24	“	55.00	224	12.32
1	2 x 16—10	“		27	1.49
8	—16	“	53.50	341	18.24
3	2 x 18—16	“		144	7.70
3	2 x 20—16	“		160	8.55
1	2 x 12—18	“	55.00	36	1.98
Mixed widths and lengths			40.00	28,444	1137.76
Cross strips, clear piles			33.00	54,109	1785.60
Roofs			30.00	11,206	336.18
1¼" Clears			83.00	19,268	1629.12
Wide Clears 1"			87.00	18,697	1626.64
Mixed " 1"			73.00	7,203	525.82
D & Better 1 x 4 clears				81,258	5931.83
1 x 6 clears				89,945	6565.99
1 x 8 "				61,484	4488.33
1 x 10 "			77.00	52,421	4036.42
1 x 12 "			82.00	26,367	2162.09
2" all widths and lengths			82.00	32,908	2698.46
				<hr/>	
				2,116,270	feet
Less, no advance				116,270	
				<hr/>	
				2,000,000	105123.35

Witness excused.

Testimony of W. C. Lubrecht, for Plaintiffs.

W. C. LUBRECHT, a witness called on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination by Mr. PARSONS. [142—36]

My name is W. C. Lubrecht; I am fifty years old, and have been in the lumber business twenty-five years. My experience has been principally in the sales end of the business, and operation. I am now connected with the Anaconda Copper Mining Company at Bonner—used to be the Big Blackfoot Milling Company; I have been connected with that company 21 years at Bonner.

Explaining how the current market price of lumber is fixed on the one hand, and the highest market price on the other hand, and the difference between them, I will say the current prices, of course, are a matter of opinion, strictly, I would say, of the different sales organizations that are engaged in the lumber business. Of course, the competitive conditions through the different districts in the country, the yellow pine in the south, and the fir and other woods in the west, the California situation, and the Inland Empire, they all, in the natural economic workings of the industry, find a level, where they find their consuming markets, and it is the pressure from one region or the other that naturally holds the prices down, and the lack of pressure that permits them to rise. Explaining the difference between the highest market price and the current or ordinary market price, I will say that

(Testimony of W. C. Lubrecht.)

there are always some sales organizations, of course, who are what are known as "price getters," and they refuse to leave their products go at what would be considered the ordinary, average market; they seek the cream of the market, from the study they make of it, and find the trade that has the least pressure for forcing down the prices; and, of course, organizations of that kind who have the time and the personnel to secure this cream market naturally secure the highest prices. The variation between the ordinary and current market price of lumber and the highest market price in this [143—37] state wouldn't always be the same or anywhere near the same on account of the conditions of the market. You referred a while ago to the "runaway" market, and the "runaway" market, why, looking for the best prices, they can secure any price they ask, almost, if they can make deliveries of the stock that is desired; and in a depressed market, of course, it is a matter of urgency for one outfit or the other to get the money required to keep them floating for a while. I would say the variation between the average and the high, between May 1st and September 1st, in this community, would run somewhere between two to five dollars a thousand on some items, particularly the higher grades of items.

I have a copy of the bill of particulars, or inventory of two stocks apparently, supposed to be down at Pablo submitted to me by Mr. Donlan. I have gone over the character of this lumber, its

(Testimony of W. C. Lubrecht.)

grades, dimensions, sizes and quantity, as shown by this bill of particulars. As to what is the average price that I would fix on that lumber in Exhibit 9, 3,338,412 feet on August 3, 1920, there are several items here that were so specified, that it would be hard to tell without having made an examination of the stock, as to just what grade it would be or ship out; for instance, the 2" marked as #1 Common, I put a very conservative value on that, merely charging it up with the #3 board grade; as a matter of fact if it is the grade it is supposed to be, #1 Common, it would carry five or six dollars a thousand more values than I figured on that item. Assuming that my reduction is correct, I figured up the entire list at prices I was making on similar lumber at the period referred to, and averaged the total quantity at \$50.65 a thousand. Assuming it is #1 instead of #3, figuring on what the same class of #2 stock would average ordinarily, in our ordinary operations, and [144—38] on my experience, I would raise the general average for the entire amount about \$1.50, making it \$52.15.

I would say it was a seller's market from the first of May to the first of September, 1920, favorable to the seller, no pressure, very easy to sell lumber; it was a matter of making delivery and getting what stock was wanted. Assuming the bill of particulars, Exhibit 9, is correct, between the first of May and the first of September or October, if anyone was in position to guarantee good delivery and were in touch with the general markets in the country, with

(Testimony of W. C. Lubrecht.)

organizations of any size at all or competency, I think two or three weeks might have been sufficient to clean up a stock like that—to take up orders for a stock of that kind.

As I remember the market during the period from the first of May to the first of September, there was very little variation; in fact it was fairly well stabilized with most of the producers, although some were off the general market, either up or down, principally up; and from a little later than the first of May until the first of September, we didn't change our prices at all; we maintained a consistent, steady card on all sales that we could take or handle. The figures I gave are the absolute prices we were charging for all the sales we were making. Our prices were the Weyerhaeuser Sales Company prices; we simply adopted their card and stayed with it during that period. They were a little lower than some of the others, particularly on select items; some of the larger outfits in the Inland Empire were, as I remarked before, securing a little more for their selects; others might have been securing a little more; I didn't learn about that. [145—39]

Cross-examination by Mr. HALL.

I think a lot of the mills accepted the Weyerhaeuser list; it was a rather broken year and early in the year there was a runaway market and a disposition on the part of many of the manufacturers to try to stabilize it, and the Weyerhaeusers took the first tumble with the market in February in what they claimed to be efforts in stabilization

(Testimony of W. C. Lubrecht.)

and to head off the runaway, and in common with some others we adopted the course of staying with them in their efforts to do this, and we followed their card quite closely all year. The peak of the market was in February, would be my recollection. I don't think the Weyerhausers changed their prices until along in May after the February break; it was a little higher in May with some items, I believe. As to the general run of lumber, they adjusted up on commons, I believe, in May, and then June first they fixed the card, and that card was only in effect for a short time, and they made the slight change on June 12th or along about that time, and from then on to September first they guaranteed the prices against any advance and they maintained them. The market wasn't down during that period, I wouldn't consider, from my recollection of the market here, until away after, some time in September, when we first felt the declining.

I don't know anything about the quality of the lumber cut at Pablo only from hearsay; I know everyone that has talked about the lumber down there said they had a nice quality of pine; I don't know it myself. These prices I have given are loaded on the cars; that is, put through the planer and on cars.

Redirect Examination by Mr. PARSONS.

If that price were \$2.50, the yard price would be \$2.50 [146—40] deducted from the price which

(Testimony of W. C. Lubrecht.)

I gave—whatever the cost of this operation would be; I don't know. To make the yard price you have to deduct the cost of loading and the cost of milling.

Witness excused.

Testimony of C. H. Richardson, for Plaintiffs.

C. H. RICHARDSON, a witness called on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is C. H. Richardson; I am the manager of the Western Lumber Company, and have operated in this country about 21 years. I have been in the wholesale lumber business about that length of time; I have been in the retail business for 35 years. I am general manager of the Western Lumber Company; I have had experience in sales and purchase of lumber. I would say the lumber market in this country between the 16th day of April and the first day of October or the first day of September, 1920, was a very good market for the seller. I don't remember of any great variation in prices during that period. There is a difference between the highest market value of lumber and the market value of lumber, which depends on circumstances. I have a list submitted to me by counsel or by Mr. Donlan, which is a copy of plaintiffs' bill of particulars.

Plaintiffs' Exhibit 9, identified by the preceding witness, was then, without objection, introduced in evidence, and reads as follows:

Plaintiffs' Exhibit No. 9.

8/30/20		Ave. \$50.65			
591 pcs. 1 x 4—12	No. 1 & 2 Com.		2,364		
1281	—14	"	8,342	5,978	48.00 400.42
1457	—16	"		7,771	50.00 388.55
1644	1 x 6—12	"		9,864	
1824	—14	"	22,632	12,768	40.00 1108.97
5017	—16	"		40,136	51.00 2046.94
[147—41]					
1946	1 x 8—12	"		15,568	
2371	—14	"		22,130	
9092	—16	"	134,678	96,980	49.50 6666.56
1746	1 x 10—12	"		17,460	
1092	—14	"		12,740	
6627	—16	"	118,560	88,360	50.00 5928.00
805	1 x 12—12	"		9,660	54.00 521.64
1126	—14	"		15,764	52.50 827.61
0705	—16	"		171,282	51.00 8735.38
	8 & 10 ft.			21,680	49.50 1073.16
1471	1 x 4—12	No. s Com.		5,884	34.00 200.06
2501	—16	"		13,339	35.00 466.87
1541	1 x 6—12	"		9,246	
1327	—14	"	18,535	9,289	37.50 695.06
4391	—16	"		35,128	39.50 1387.56
1289	1 x 8—12	"		10,312	
1104	—14	"		10,304	
6233	—16	"	87,101	66,485	38.50 3553.38
1183	1 x 10—14	"		13,794	
4060	—16	"	67,927	54,133	38.50 2615.11
830	1 x 12—12	"		9,960	40.00 398.40
1119	—14	"		15,666	
5545	—16	"	104,386	88,720	39.00 4071.00
Mixed 18 & 20				18,180	38.50 699.90
" 8 & 20				5,025	37.00 185.93
No. 4 Boards				207,539	33.00 6848.78
1838	2 x 4—12	No. 1 Com.		14,704	
2326	—14	"	36,413	21,709	34.00 1238.06
8218	—16	"		87,658	35.00 3068.06
12	—18	"		144	
1	—20	"	157	13	34.00 5.32
9	2 x 6—10	"		90	
1082	—12	"		12,984	

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1962	—14	“	40,542	27,468	37.50	1520.33
7135	—16	“		104,098	39.50	4506.87
82	—18	“		1,476		
78	—20	“	3,036	1,560	37.50	113.85
19	—24	“		456	37.50	17.10
4	2 x 8—10	“		53		
707	—12	“		11,312		
1016	—14	“		18,966		
3240	—16	“		64,965		
236	—18	“		5,664		
20	—20	“		533		
10	—24	“	101,815	320		
2	2 x 10—10	“		33		
388	—12	“		7,760		
488	—14	“		11,387		
1094	—16	“		29,173		
312	—18	“		9,360		
89	—20	“		2,967		
8	—22	“		294		
6	—24	“	163,027	240	38.50	6276.54
2	2 x 12—10	“		120		
166	—12	“	4,104	3,984	40.00	164.16
280	—14	“		7,840		
1359	—16	“	51,328	43,488	39.00	2001.79
156	—18	“		5,616	40.00	224.64
23	—20	“		920		
6	—22	“		264		
7	—24	“	1,520	336	40.00	60.80
6	2 x 14—16	“		224		
4	—24	“		224		
48—42]						
1	2 x 16—10	“		27		
8	—16	“		341		
3	2 x 18—16	“		144		
3	2 x 20—16	“		160		
1	2 x 12—18	“	1,156	36	40.00	46.24
Mixed widths & lengths				28,444	38.50	1095.09
Cross strips, clear piles				54,109		
Roofs				65,315	11,206	30.00
1½ Clears				19,628	86.50	1697.82
Wide “ 1”				18,687	93.50	1747.23
Mixed “ 1”				7,203	79.00	569.04
1 x 4 clears				81,258		
1 x 6 “				89,945		

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1 x 8 “	232,687	61,484	79.00	18382.27
1 x 10 “		52,421	83.00	4350.94
1 x 12 “		26,357	88.50	2332.55
2" all widths and lengths		32,908	88.50	2912.36
		<hr/> 2,116,270 feet		
Less, no advance		116,270		35153.83
		2,000,000	“	67756.15
			48.63	102909.93
		<hr/> Feet		
Before 8/3 advanced on.				
817 pcs. 1 x 4—14 No. 1 & 2 Com.		3,813	48.00	183.02
781 —16 “		4,165	50.00	208.25
314 1 x 6—10 “		1,570		
1093 —12 “	8,128	6,558	49.00	398.27
1094 —16 “		8,752	51.00	446.35
83 1 x 8— 8 “		443	46.00	20.38
226 —10 “		1,507		
1229 —12 “		9,832		
2877 —14 “		26,852		
5341 —16 “	95,161	56,970	49.50	4710.47
39 1 x 10— 8 “		260	46.50	12.05
410 —12 “		4,100		
482 —14 “		5,623		
2940 —16 “	48,923	39,200	50.00	2446.15
22 1 x 12— 8 “		176	47.00	8.27
159 —10 “		1,590	55.00	87.48
887 —12 “		10,644	54.00	574.78
511 —14 “		7,154	52.50	375.55
5109 —16 “		81,744	51.00	4168.94
1 x 4 to 12—18 & 20 ft.		18,005	49.50	891.23
All widths 10 “ 1”		1,675	49.50	82.91
“ “ & lengths 1”		71,468	49.50	3537.67
556 pcs. 1 x 4—10 No. 3 Com.		1,887		
766 —12 “		3,064		
1628 —14 “	12,548	7,957	34.00	426.65
539 1 x 6—10 “		2,695		
997 —12 “		5,982		
866 —14 “	14,319	5,642	37.50	536.96
1856 —16 “		14,848	39.50	586.50

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203	1 x 8— 8	“		1,083	36.00	38.99
376	1 x 8—10	“		2,507		
1319	—12	“		10,552		
192	—14	“		7,792		
8955	—16	“	110,371	95,520	38.50	4249.28
50	1 x 10— 8	“		333	36.00	11.99
[149—43]						
514	—12	“		5,140		
1207	—14	“		14,082		
3114	—16	“	60,742	41,520	38.50	2338.57
40	1 x 12— 8	“		320	36.50	11.68
197	—10	“		1,790		
474	—12	“	7,658	5,688	40.00	306.32
1168	—14	“		16,352		
7009	—16	“	128,496	112,144	39.00	5011.34
23	1 x 10—18	“		345	38.50	13.28
Mixed widths and lengths, 1”				8,177	38.50	314.81
No. 4 Boards				50,341	33.00	1661.25
No. 5 “				15,965	25.00	399.13
144 pcs.	2 x 4—12	No. 1 Com.		1,152		
367	—14	“	4,577	3,425	34.00	155.62
736	—16	“		7,851	35.00	274.79
114	—18	“		1,368		
19	—20	“	1,621	253	34.00	55.11
8	2 x 6—10	“		80		
169	—12	“	2,108	2,028	37.50	79.05
175 pcs.	2 x 6—14	No. 1 Com.		2,450	37.50	91.88
725	—16	“		11,600	39.50	458.20
62	2 x 8—10	“		827		
192	—12	“		3,072		
290	—14	“		5,413		
1093	—16	“		23,318		
94	2 x 10—12	“		1,880		
113	—14	“		2,637		
356	—16	“	46,640	9,493	38.00	1795.64
24	2 x 12—10	“		480		
79	—12	“	2,376	1,896	40.00	95.04
95	—14	“		2,660		
429	—16	“	16,388	13,728	39.00	639.13
2 x 6 to 12 asst. lengths				10,294	38.50	396.32
1 x 4 Selects, C & better				131,787		
1 x 6 “ “ “				78,235		
1 x 8 “ “ “				260,705	50,683	82.00 21377.81

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1 x 10 " " "	43,510	86.00	3741.86
1 x 12 " " "	8,112	92.00	746.30
1 x 13 & wider, select, C & better	10,337	97.00	1002.69
1" mixed widths and lengths, select C and better	16,659	82.00	1366.04
1 x 4—16 selects, C & better	1,877	82.00	153.91
2" mixed widths and lengths selects, C & better	7,072	92.00	650.62
4/4 Factory, C & better Shop	85,538	48.00	4105.82
5/4 Factory, C & better	2,763	82.00	226.57
5/4 No. 1 Shop	8,287	74.00	613.24
	<hr/> 1,338,412	53.86	
			37461.07
			34623.14
			<hr/> 72084.21

Plaintiffs' Exhibit 10, then produced by the witness Richardson and admitted in evidence without objection, is in words and figures as follows: [150—44]

Plaintiffs' Exhibit No. 10.

Old Yard			Average 49.90		
			Price		
			No. 1	No. 2	Com.
591	pes. 1 x 4—12	No. 1 & 2 Com.	69.50	2,364	48.00
1281	—14	"	"	5,978	48.00 "
1457	—16	"	71.50	7,771	50.00
1644	1 x 6—12	"	70.50	9,864	49.00
1824	—14	"	70.50	12,768	49.00
5017	—16	"	71.50	40,136	51.00
1946	1 x 8—12	"	69.50	15,568	49.50
2371	—14	"	"	22,130	"
9092	—16	"	"	96,980	"
1746	1 x 10—12	"	70.50	17,460	50.00
1092	—14	"	"	12,740	"
6627	—16	"	"	88,360	"
805	1 x 12—12	"	75.50	9,660	54.00
1126	—14	"	74.00	15,764	52.50
10705	—16	"	"	171,282	51.00
	8 & 10 ft.		"	21,680	Avg. #1 & 2—8" 59.5
1471	1 x 4—12	No. 3 Com.	200.06	5,884	34.00
2501	—16	"	466.86	13,338	35.00
1541	1 x 6—12	"	346.73	9,246	37.50
1327	—14	"	348.33	9,289	"
4391	—16	"	1387.56	35,128	39.50
1289	1 x 8—12	"	397.01	10,312	38.50
1104	—14	"	396.70	10,304	"
6233	—16	"	2539.67	66,485	"
1183	1 x 10—14	"	531.07	13,794	"
4060	—16	"	2084.12	54,133	"
830	1 x 12—12	"	398.40	9,960	40.00
1119	—14	"	610.98	15,666	39.00
5545	—16	"	3460.08	88,720	"
	Mixed 18 & 20	"	681.75	18,180	37.50
	" 8 & 20	"	173.36	5,025	34.50

No. 4 Boards		No. Com.		6848.79	207,539	33.00
1838	2 x 4—12			444.80	14,704	30.25
2326	—14	"		656.70	21,709	"
8218	—16	"		2739.31	87,658	31.25
12	—18	"		4.65	144	32.25
1	—20	"		.42	13	"
9	2 x 6—10	"		2.81	90	31.25
					(697,322)	
1082	—12	"			12,984	29.75
1962	—14	"		24720.15	27,468	"
7133	—16	"				
82	—18	"			114,098	30.75
78	—20	"			1,476	31.25
19	—24	"			1,560	"
4	2 x 8—10	"			456	32.25
707	—12	"			53	31.25
016	—14	"			11,312	29.75
240	—16	"			18,966	29.75
236	—18	"			64,965	30.75
20	—20	"			5,664	31.25
10	—24	"			533	31.25
2	2 x 10—10	"			320	32.25
388	—12	"			33	32.00
488	—14	"			7,760	31.00
094	—16	"			11,387	31.00
312	—18	"			29,173	31.50
89	—20	"			9,360	32.00
51—45]	—22	"			2,967	32.00
8	—24	"			294	33.00
6	2 x 12—10	"			240	33.00
2	—12	"			120	32.50
66	—14	"			3,984	31.50
80	—16	"			7,840	31.50
59	—18	"			43,488	32.00
56	—20	"			5,616	32.50
23	pes. 2 x 12—20	No. 1 Com.			920	32.50
6	—22	"			264	33.50
7	—24	"			336	33.50
6	2 x 14—16	"			224	33.50
4	—24	"			224	35.00
1	2 x 16—10	"			27	35.00
8	—16	"			341	34.50

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3	2 x 18—16	“		144	36.50	
3	2 x 18—20	“		160	38.00	
1	2 x 12—18	“		36	32.50	
	Mixed widths & lengths			28,444	40.00	
	Cross strips, clear piles			54,109	33.00	
	Roofs			11,296	33.00	
	1¼ Clears	D Sel	80.50	19,628	C Sel	87.50
	Wide “	1”	90.00	18,687		
	Mixed “	1”	87.00	7,203		
	1 x 4 clears	D Sel	73.50	81,258	C Sel	79.50
	1 x 6	“ “	“	89,945	“ “	“
	1 x 8	“ “	“	61,484	“ “	“
	1 x 10	“ “	77.50	52,421	“ “	83.50
	1 x 12	“ “	82.50	26,357	“ “	89.50
	2” all widths and lengths					
		D Sel	82.50	32,908	C Sel	89.50
				<hr/>		
				2,116,270 feet		
				116,270 “		
Less, no advance				<hr/>		
				2,000,000 “		
<hr/>						
New Yard						
Before	8/3	advanced on,		No. 1	Feet	No. 2
817 pcs.	1 x 4—14	No. 1 & 2 Com.		69.50	3,813	48.00
781	—16	“		71.50	4,165	50.00
314	1 x 6—10	“		70.50	1,570	49.00
1093	—12	“		70.50	6,558	49.00
1094	—16	“		71.50	8,752	51.00
83	1 x 8— 8	“			443	46.00
226	—10	“		69.50	1,507	39.50
1229	—12	“		“	9,832	“
2877	—14	“		“	26,852	“
5341	—16	“		“	56,970	“
39	1 x 10— 8	“			260	46.50
410	—12	“		70.50	4,100	50.00
482	—14	“		“	5,623	“
2940	—16	“		“	39,200	“
22	1 x 12— 8	“			176	47.00
159	—10	“		75.50	1,590	55.00
887	—12	“		“	10,644	54.00
511	—14	“		74.00	7,154	52.50
5109	—16	“			81,744	51.00

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1 x 4 to 12—18 & 20 ft.				49.50	18,105	
All widths		10 “ 1”		“	1,675	
“	“	& lengths 1”		“	71,468	
[2—46]						
64.16	566	pcs. 1 x 4—10	No. 3	Com.	1,877	34.00
04.18	766	—12	“		3,064	“
58.30	1628	—14	“		7,597	“
01.06	539	1 x 6—10	“		2,695	37.50
24.33	997	—12	“		5,982	“
11.58	866	—14	“		6,642	“
86.50	1856	—16	“		14,848	39.50
38.99	203	1 x 8— 8	“		1,083	36.00
96.52	376	1 x 8—10	“		2,507	38.50
06.25	1319	—12	“		10,552	“
68.99	192	—14	“		1,792	“
77.52	8955	—16	“		95,520	“
11.99	50	1 x 10— 8	“		333	36.00
97.89	514	—12	“		5,140	38.50
42.16	1207	—14	“		14,082	“
03.52	3114	—16	“		41,520	“
11.68	40	1 x 12— 2	“		320	36.50
78.80	197	—10	“		1,970	40.00
27.52	474	—12	“		5,688	“
37.73	1168	—14	“		16,352	39.00
73.62	7009	—16	“		112,144	“
13.28	23	1 x 10—18	“		345	38.50
06.64	Mixed widths and lengths 1				8,177	37.50
<hr/>						
43.21					359,240	
4 Boards					50,341	33.00
5 “					15,965	27.00
44 pcs. 2 x 4—12	No. 1	Com			1,152	20.25
37	—14	“			3,425	“
36	—16	“			7,851	21.25
4	—18	“			1,368	32.25
9	—20	“			253	32.25
8	2 x 6—10	“			80	31.25
39	—12	“			2,028	29.75
5	—14	“			2,450	“
5	—16	“			11,600	30.75
32	8 x 8—10	“			827	31.25
2	—12	“			3,072	29.75
0	—14	“			5,413	“

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1093	—16	“	23,318	30.75
94	2 x 10—12	“	1,880	31.00
113	—14	“	2,637	“
356	—16	“	9,493	31.50
24	2 x 12—10	“	480	32.50
79	—12	“	1,896	31.50
95	—14	“	2,660	“
429	—16	“	13,728	32.00
	2 x 6 to 12 asst. lengths		10,294	50.00
	1 x 4 Selects, C & Better		131,787	C Sel 79
	1 x 6 “ “ “		78,235	“
	1 x 8 “ “ “		50,683	“
	7 x 10 “ “ “		43,510	83
	1 x 12 “ “ “		8,112	89
	1 x 13 & wider, select, C & Better		10,337	94
	1" mixed widths and lengths select, C. & Better		16,659	79
	1 x 4—16 selects, C & Better		1,877	C Sel 79
	2" mixed widths & lengths, selects, C & Better		7,072	“ 89
[153—47]				
	4/4 Factory, C & Better		85,538	73.00
	5/4 “ “ “		2,763	80.00
	5/4 No. Shop		8,287	75.00
			<hr/> 1,338,412	

(Testimony of C. H. Richardson.)

Direct Examination (Resumed).

By the WITNESS.—Assuming that lumber is of the grade, kind, character, dimensions and quantity as specified in plaintiffs' bill of particulars, I would say the price of the lumber from the first day of May to the first of October, 1920—the average, at the prices we were selling lumber at, I figure would be \$51.16 f. o. b. the car. Whatever it would cost to plane and load it would be deducted from my price. This extension of figures that is on the exhibit are my figures in each instance.

Cross-examination by Mr. POPE.

These prices I have mentioned are based on the assumption that the lumber was loaded on cars and ready to sell at that time.

Witness excused.

Testimony of J. P. Flanagin, for Plaintiffs.

J. P. FLANAGIN, a witness called on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is J. P. Flanagin; my age is 53; I am a lumberman, planing-mill man; I have been engaged in that business 35 years. I am now engaged at Pablo; in 1920 I was engaged at Pablo and Philomen Spur with Donlan & Henderson. I am familiar with this three million three hundred thirty-odd thousand feet of lumber that was burned on August 3d, 1920. I was working there at that time

(Testimony of J. P. Flanagin.)

operating the planing mill—that is, part of the time. I was operating in this particular yard and planing what [154—48] was planed of this particular lumber. The actual and reasonable cost, under the circumstances under which we operated, for planing and loading this lumber on the cars—that is, changing it from the pile to f. o. b., was about \$2.35 a thousand. The grades of this lumber overrun—that is, it graded better than what was in the pile in the rough. I mean that the #4 would grade anyway 15% better than #3 and better. After it was taken from the pile in the yard, the #4 which was graded at the sawmill, and the #4 in the pile in the yard, when it was taken out to be shipped would be re-graded, and the grade would run 15% better, or approximately that. The lumber was western white pine, the #4 common that I am speaking of. Comparing it with other lumber of similar character in this country, it was a little above the average.

From May first on I ran the planer; the capacity of the planer was thirty or thirty-five thousand for a 9-hour shift; for a double shift it would be double that. We had no labor difficulties or other difficulties to prevent us running it double shift if we so desired.

Cross-examination by Mr. TURPIN.

On April 16th we had at that mill at Pablo for siding lumber a Woods 15" 4-side machine, 15x6, and a Woods 8x6-8" wide and 6. We got a new

(Testimony of J. P. Flanagan.)

machine sometime during 1920; we got that after the fire. I said that the grades of the lumber ran a little better dressed than they were in the pile; a man by the name of Johnson did the grading. I know it was graded better from the fact that it was graded through and the #3 and the shot pack was put in separate bodies. I know that as to all of it; I know only as to that part dressed that it ran better; that out in the pile was only determined when it was [155—49] dressed. I said it cost \$2.35 to plane it, dress it and load it. The elements that go to make that up are the cost of labor against what was dressed and the feet that was dressed per day. We were paying labor at that time from \$5.25 to \$6.30. Peters, who actually worked in the mill dressing the lumber, I paid from \$5.50 to \$6.00 a day. Besides him we had an edger whom we paid \$6.25. We had a grader whom we paid \$7.00 or \$6.30. Besides them we had off-bearers and general labor men loading cars. We paid the off-bearers \$5.25 and \$5.50. Those are all prices per day of nine hours. We paid one of the men loading the cars \$5.50 and the other one \$5.25.

I am familiar with the averages of the different grades of lumber. I do not know how much those planing-machines cost that we had there; I don't know how much of an investment that was. Our power up there is a steam engine; we use shavings for fuel. We had an engineer to tend the engine and paid him \$6.25 a day.

(Testimony of J. P. Flanagan.)

Redirect Examination by Mr. PARSONS.

There was a deduction of \$1.25 a day kept from these men's wages for board.

Witness excused.

Testimony of Ed. Donlan, for Plaintiffs.

ED. DONLAN, one of the plaintiffs, called as a witness in their behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Ed. Donlan; I am one of the plaintiffs in this case; I have been in the lumber and logging business for about 40 years. In that time I have cut in lumber, in Montana, over 254 million feet. 28 years of the time I have been in the lumber [156—50] business has been spent in the State of Montana. I am familiar with the character of the timber that was manufactured into lumber at our mill at Fletcher Spur during the months of April to November, 1920. The character of that timber and the lumber sawed from that timber was a very good—exceptionally good grade of pine—run well for uppers and shop lumber. I think that lumber was well graded.

Witness excused.

Plaintiffs rest.

DEFENDANT'S CASE.

Testimony of Thomas S. Dennis, for Defendant.

THOMAS S. DENNIS, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. POPE.

My name is Thomas S. Dennis; I am secretary and treasurer of the defendant in this case, and have held that office since the inception of the company in January, 1920. The nature of the defendant's business is the wholesale lumber business. The company comports or functions as most any wholesale lumber company would; we act as a sales agent, or sales organization, I will say, for those mills who haven't selling organizations of their own or haven't sufficient selling organizations to carry on; we act in the capacity, you might say, as backers to small millers who haven't sufficient capital to finance their own operations and require loans or advances in order to take care of their own operations. My personal duties are primarily in charge of the Inland Empire operations of the company; I handle both the sales and the orders for that division. By Inland Empire [157—51] I refer to the territory between the two ranges of mountains, comprising Montana, Idaho, Washington and Eastern Oregon.

In connection with this case I first met Mr. Donlan on or about April 14th, 1920, at Missoula. I first met Mr. Donlan at the Palace Hotel the

(Testimony of Thomas S. Dennis.)

day of my arrival here; it seems he had been in conference with Mr. Juneau a day or two previous in regard to the transactions proposed, had submitted a proposition to Mr. Juneau which he wired to me, enroute, at Salt Lake; I had wired Mr. Juneau a rejection of the proposal and counter proposals, and when I first met Senator Donlan our discussion was in connection with his proposal and my counter proposal. Senator Donlan advised me that he was contemplating the purchase of the Smead proposition at Pablo; that it had been stated that Smead was willing to sell, and before doing so he wanted to make a contract for the sale of all lumber which was on hand and any subsequent lumber which he might manufacture, after taking over the operation, and he offered to make a contract with us to sell all the lumber which was on hand at that time on the basis of the July, 1919, price list, using the f. o. b. mill basis price as a basis. This list referred to is the basis price list published, I believe, July 15, 1915. The Senator further proposed that in consideration of selling this lumber to us at that price we were to make him an advance payment of \$20 per thousand on the lumber then in pile, and a loan of \$20,000 to be paid in three and four months. I told the Senator that what Mr. Juneau had previously advised him represented our attitude towards that; that we were not in position at that time to consider any contract that anticipated our agreeing to any stipulated price; the market was in a very

(Testimony of Thomas S. Dennis.)

chaotic condition; it had reached the peak after a runaway market and there had been a price list issued by the Weyerhaeuser concern [158—52] which had been given wide publicity, stating that they were cutting their prices 30% and guaranteeing those prices until June 20th; that in the face of those conditions it would be impossible for us to contract for any operation that anticipated our agreeing to a stipulated price, but that we had made other contracts and offered to make the same character of contract with him, to handle the sale of his lumber, securing the best price we could, and charging a commission of 15% for our services, and if we could agree on details and conditions and his proposition looked favorable upon investigation and our company was able to swing the initial investment, I would be glad to consider a proposition of that kind. Senator Donlan stated that he didn't care for a proposition of that kind and when pressed for reasons, he said first that he wouldn't know whether he was getting full worth of any sale of that kind if he turned his lumber over to us and let us sell it for him, and second he wasn't sure that we would get the full, open price for him; I told him he could satisfy himself as to the latter by investigating our reputation in the Inland Empire, and as to the former we were perfectly willing to install some sort of system whereby he would receive certified copies of the invoices we sent out to our customers, or he would

(Testimony of **Thomas S. Dennis.**)

have the privilege of examining our books any time he wanted to.

We discussed the subject of securities because I explained it would be impossible for us to make any advances unless the operation would justify it and we were furnished proper security. Senator Donlan replied that that could be had all right by giving us bills of sale covering the money we advanced, and I told him that was acceptable to us, providing he would incorporate in the agreement that we were to have the lease on the ground on which the lumber was to be stacked, as I had heard [159—53] that a bill of sale wasn't binding in Montana, and he agreed to that, and that was left to the later details to be detailed after the examination of the property. I am not certain there was anything said about marking the lumber at that time; there was during this general conference. I am not certain whether the discussion for the insurance came up before I went to Pablo or after my return, but prior to the general conference in Mr. Violette's office in which the contract was drawn up I told the Senator we would have to be protected for our advancements by the insurance, and he said that was all right, and I said we would expect \$25 a thousand protection, and he said, "What is the \$25 a thousand for; you are only advancing \$20 a thousand?" I explained to him that in an operation of this kind anticipating a run of several months or indefinitely, we could not afford to tie up the heavy proportion of

(Testimony of Thomas S. Dennis.)

our capital in such an operation and devote my time and our western representative's time to the operation and put other items of expense into the handling of their operations before the lumber was in shipping shape and then have it all burn up and not have any manner in which we could recover the expenses we had invested.

On the 14th or 15th of April, about 11 o'clock we went to Pablo, went through the timber, the company's yard and over the proposition as fully as possible, finished about 7 o'clock and had supper there; I returned to Missoula that night, arriving about 11 o'clock. I saw Senator Donlan the next morning, told him I had examined the proposition and it looked favorable to me, and I would be willing to go ahead provided I received advices from our office that they could handle the advances. Later in the day I received that advice with some suggestions as to the extended payments. Mr. Donlan had requested that we give him \$60,000 cash and our company wired me that they could [160—54] handle it by making a \$20,000 cash payment, \$20,000 in two weeks and \$20,000 in 30 days. I notified Mr. Donlan of that. That was on the day after my trip to Pablo. Mr. Donlan said he would have to submit that to his banker, so we went and met his banker, Mr. Keith; Mr. Donlan submitted the proposition to him and he seemed a little disappointed, said he expected to get all of this in cash but he could arrange to take care of it if I reduced the time of the second payment to ten days

(Testimony of Thomas S. Dennis.)

and give him an acceptance, signed by myself as secretary and treasurer of the company, so that he could use them as cash items. I agreed to that. I saw Mr. Donlan that night after dinner; he said they had made their arrangements with Mr. Smead, we would wait until morning, get together and write up our contract.

We met some time before ten o'clock next morning; that was at Mr. Violette's office. Mr. Donlan asked me if I had any attorney I wanted to refer to; I told him no, I didn't know any attorney here; I would just leave it to his attorney, that we understood what we were attempting to agree to and we would just ask his attorney to get it up. I don't recall what Mr. Donlan said to that. Senator Donlan suggested we go to his attorney; I don't believe he mentioned his name until the next morning. I went to Mr. Violette's office in company with Mr. Donlan; Mr. Juneau was along. Mr. Violette was either not there or had just come in; at any rate within a short time he came.

Senator Donlan explained to Mr. Violette that we had this conference and had agreed on the basis for our contract and had come to him to prepare it; he then related in a general way the conditions that we had agreed to; whenever they didn't exactly state the situation as I understood it I called his attention to the discrepancy, but between us we presented our understanding of the case to Mr. Violette, who took notes down in longhand [161—55] as we explained the agreement to him. I can hardly

(Testimony of Thomas S. Dennis.)

explain what language or explanation was given to Mr. Violette at that time as to the agreement unless I go over all I said, because Senator Donlan simply repeated to Mr. Violette what we had discussed and agreed on between ourselves, that is, that he would agree to make the contract with us to handle the sale of his stock at Pablo, on certain conditions which imposed on us the necessity of making certain advances to them, and of obtaining the best prices for the lumber we could, and on the other hand imposed on them the necessity of giving us certain protection as security for our advances and loans and to pay us commission for handling his sales. The words and description of the understanding was substantially what I have testified to already.

After Mr. Violette had taken his notes he said it would take him a little while to go over them and get it up in legal form and suggested that we adjourn and come back after lunch, which was done. The contract had been made up in the meantime. This was either the 15th or 16th of April; it was the day following my first conference with Mr. Donlan; it was the date the instrument was signed. Plaintiff's Exhibit 5 seems to be the original instrument which was drawn by Mr. Violette in his office at that time; that is my signature attached thereto. I certainly read it over before I signed it. I didn't at that time make any particular notice that this was referred to as a contract of sale or pay any particular notice to any of the phraseology of the contract other than its intent. I might say, in ex-

(Testimony of Thomas S. Dennis.)

planation of that, that I am not at all familiar with legal phrases and terms and it would have been entirely useless for me to attempt to set up an examination of it as to its legal bearing, other than whether it stated definitely the agreement existing between us, which we were trying to cover by the document. [162—56] In respect to those provisions in the contract which state what the various parties were to do it seems to me to cover the case very clearly. If I saw the words which designate me and my company as the vendee, I simply read them through without giving them any consideration. Frankly, I didn't know just what the words "vendee" and "vendor" would mean in a document as establishing relationship. In regard to the agreement between ourselves and Senator Donlan as to the purposes which the bills of sale were to serve, I explained to Senator Donlan that we couldn't very well advance money to him without having some security to protect us in these drafts, and he stated that he was willing to give us these bills of sale as security; I explained that we were willing to accept bills of sale as security if we had a lease on the ground where where the property was stored so that we could enforce the bills of sale in case of necessity. The word "purchaser" in describing our company as the purchaser absolutely did not accurately represent the agreement that was entered into between myself and Senator Donlan prior to the drawing up of this instrument. I signed it in that form because in reading the document I examined it purely from

(Testimony of Thomas S. Dennis.)

the standpoint of whether it covered the obligations which each bore to the other and made no attempt to diagnose its phraseology or the manner in which it was drawn; the contract seemed so clearly to set out the things we agreed to do that that in itself satisfied me as to its effectiveness. As to my understanding of the meaning of the clause marked clause Five in the contract, I think it very clearly states that the bill of sale was to be given to us as security, but the bill of sale itself is hinged by the statement in the contract that it is subject to the balance which was to be due Donlan & Henderson on the fulfillment of the obligations which each of us undertook [163—57] to work out; that was my understanding at that time. Neither Mr. Donlan nor I, to my knowledge, suggested to Mr. Violette the use of the words “vendors” or “vendees”; we simply stated what we wanted to cover and left the contract, so far as I know, to Mr. Violette to work out himself. There was no suggestion, so far as I know, as to what words should be used, or phrases or language, respecting also the words “contract of sale” and “purchase.”

At the time the instrument here was signed I gave the banker, Mr. Keith, drafts for the amounts of money; those I have with me in my portfolio there.

By Mr. PARSONS.—We admit that these drafts were drawn on April 15th, in the sum of \$60,000, and that the plaintiffs received that amount in due course.

By the WITNESS.—\$40,000 of this \$60,000 de-

(Testimony of Thomas S. Dennis.)

livered to Donlan & Henderson was advanced on account of lumber. The contract stipulated that we were to make an advance of \$20 per thousand on 2,000,000 feet; that would be \$40,000. We received notes from Donlan & Henderson covering the remaining \$20,000; I have those notes. Defendant's "J" and "K" were the two notes given us by Donlan & Henderson at that time; they were executed by Donlan & Henderson and endorsed or signed by Donlan & Henderson by Mr. Henderson and Mr. Donlan. They are dated April 16th, and were given at the time of the execution of this contract.

Defendant's Exhibits "J" and "K," then admitted in evidence without objection, are two promissory notes, each for \$10,000, dated April 16, 1920, in favor of Turner, Dennis & Lowry Co., bearing interest at 7%, with the usual provision for attorney's fees, signed by "Donlan and Henderson, Ben W. Henderson, E. Donlan," the former being due four [164—58] months and the latter three months after date.

By the WITNESS.—One of those notes has been entirely discharged by applying credits on future advances as provided for in the contract. The contract provided for subsequent advances on lumber to be made by advancing in cash \$10 per thousand feet to Donlan & Henderson and applying \$10 per thousand feet upon these notes. As these advances were made on subsequent shipments of lumber by them, the amounts operated to entirely

(Testimony of Thomas S. Dennis.)

discharge the first of these notes. Such advances operated to pay the second of these notes to the extent of approximately \$3,300. After computing the interest from April 16th to August 3d, at which time the credit was set against this note, the credit of \$3,235.27 was applied, reducing the balance to \$6,975.32. August 3d is the date when one subsequent advance was made. At the time the notes and drafts were given the exchange of the bills of sale was made; there was one bill of sale delivered at that time; that is the one a copy of which is marked Plaintiff's Exhibit 1.

After we had passed these instruments back and forth I went to Pablo, looked over the operations a little more carefully than I had been able to before and talked over the conditions with Mr. Henderson and to get a line on his attitude toward selling the lumber at that time under the market conditions which existed then, and find out when he would be ready to take on orders, and so forth; the matter of orders was discussed in a general way. The subject of having cars shipped on as consignment shipments was discussed in a general way, just as an eventuality which might be deemed expedient in view of the congested condition of the traffic at that time; however, Mr. Henderson [165—59] was not in shape at that time to discuss taking on orders because of certain conditions which interfered with their shipping, so nothing of any definite nature was determined. The first of those conditions was that he hadn't yet completed his negotia-

(Testimony of Thomas S. Dennis.)

tions with Smead, and of course they were not at liberty to ship any lumber out until after the inventory was determined, and secondly, he felt that the machinery he had there was antiquated and the high cost of labor there at that time he couldn't afford to use that planer, and he had made arrangements to get a fast feed machine that would enable them to put the lumber out more quickly and at less cost. There was a request that we furnish him with an order for lumber in the shed already manufactured. I asked him to furnish me a memorandum of what he had, which he agreed to mail me later. There was possibly 100,000 feet in the shed.

I am not certain that this was the 17th I was up there with Mr. Henderson; I may have been in Missoula a day or two and may have gone there the following day. I next saw Mr. Donlan for a few minutes about two or three weeks later, when I was starting east after a trip west; that was before I went back to Kansas City. Subsequently I met Mr. Donlan in Chicago—about the middle of June. I went there on a wire from Senator Donlan to meet him in Chicago at the Great Northern Hotel; when I met him he stated that they were hard up and wanted to make another loan; I told him that was very unfortunate for us, coming at a time when money was as tight as it was; our collections were slow; he explained that they were not getting under way as rapidly as they had hoped and their advances weren't going to be enough to take care of their initial expense and wanted a little

(Testimony of Thomas S. Dennis.)

additional accommodation to continue operations; he said he thought they would have to have about \$20,000, and I further explained to [166—60] him our financial stringency, but told him I would do what I could. I wired Mr. Juneau to go to Pablo and take an inventory of all of the lumber which they had cut since they started their operations and to make an advance on all of the lumber instead of on finished piles, and that we would loan him the difference between that amount and the \$20,000 he required.

It is customary for manufacturers in storing lumber for seasoning to carry the piles up to a certain height and when it reached the height satisfactory to finish means that he puts a roof or covering of low-grade boards on it to protect the top pieces from the elements and leaves the lumber there to dry and season. Our contract was based on making advances only on covered piles.

After I made this explanation Mr. Donlan was very well satisfied. The advances were actually made on such inventory. I have two drafts covering that amount, \$20,000. That includes an advance on some 890 thousand feet which Mr. Juneau inventoried as being on hand, on which we advanced \$10,000, and the balance amount on \$11,000, covering the loan which we made at that time. Notes were given by Donlan & Henderson, evidencing that loan; those I have with me. Defendant's Exhibits "L" and "M" are the drafts covering the \$20,000 advanced to Donlan & Henderson as I related, pur-

(Testimony of Thomas S. Dennis.)

suant to my agreement with Mr. Donlan at Chicago. These drafts were July 5th, \$5,000; June 28th, \$15,000. Defendant's Exhibits "N" and "O" were the notes given by Donlan & Henderson at that time, executed by Donlan & Henderson by Mr. Donlan.

Defendant's Exhibits "L" and "M" then admitted in evidence without objection, are the two drafts for \$5,000 and \$15,000 above referred to. [167—61]

Defendant's Exhibits "N" and "O," then admitted in evidence without objection, are two promissory notes, dated June 28th, 1920, in favor of Turner, Dennis & Lowry Lumber Co., signed by "Donlan & Henderson, by E. Donlan," containing the usual provision for attorney's fees, and for the amounts, respectively, of \$5,000 and \$6,082.24, interest at 8%.

By the WITNESS.—We advanced the sum of \$20 per thousand feet by applying \$10 a thousand in cash and \$10 a thousand in liquidation or part liquidation of the first note from Donlan & Henderson. We advanced \$10 a thousand feet in cash on approximately 890,000 feet, and then advanced enough more to make a total of \$20,000. This additional amount is represented by these two notes, one for \$6,082.24 and one for \$5,000. It was agreed when these notes were given that we would handle the payment of these notes the same as the \$20,000 loan, or the two notes for \$10,000, issued at the time of signing the original document. That agreement was put in writing; Defendant's Exhibit "P" is

(Testimony of Thomas S. Dennis.)

the agreement to which I referred, executed by Donlan & Henderson and by Mr. Juneau on behalf of our company.

Defendant's Exhibit "P," then admitted in evidence without objection, reads as follows:

Defendant's Exhibit "P."

SUPPLEMENTAL CONTRACT.

That whereas, a contract of sale was duly made and entered into by and between DONLAN & HEDERSON, a copartnership, of Pablo, Montana, therein called the vendors, and TURNER, DENNIS & LOWRY LUMBER COMPANY, a corporation of Jackson County, Missouri, therein called the vendee, for the sale and purchase of "All of the lumber then owned by the vendors in pile at their sawmill yard at Fletcher Spur, near Pablo, Flat-head County, [168—62] Montana, and all lumber to be sawed, cut and manufactured by them *as* such Fletcher Spur sawmill hereafter until the 1st day of January, 1921;

And whereas, besides other matters stipulated in said contract of sale, the vendee paid to the vendors, as an advancement on the purchase price, the sum of \$20.00 per thousand feet on all lumber then in pile in the mill-yard, and agreed to pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be thereafter sawed, cut and manufactured by the vendors under and during the term of said contract, which payment would be made monthly, based upon an inventory

or finished piles in the mill-yard taken on or before the 10th day of each month, PROVIDING however, that \$10.00 per thousand feet of such advancement should be applied and credited on a \$20,000.00 loan made on that day by the vendee to the vendors, evidenced by a promissory note therein mentioned;

NOW THEREFORE, as a supplement to said written contract, the said parties have hereby agreed as follows, to wit:

That the vendee shall this day loan to the vendors the additional sum of \$11082.24, for which the vendors shall execute and deliver to the vendee two promissory notes of the following tenor, to wit, one for the sum of \$6082.24, due on September 1st, 1920 with interest thereon at the rate of eight (8) per cent per annum from date until paid, and the other for the sum of \$5000.00, due on October 1st, 1920, with interest thereon at the rate of eight (8) per cent per annum from date until paid, and that the sum of \$10.00 per thousand feet of the advancement provided for in the original contract shall be applied and credited on this loan of \$11082.24, in the same manner as provided for on the former loan of \$20,000.00

That this supplemental agreement is intended and understood [169—63] to be merely an addition to the original contract of sale herein referred to, and it is expressly understood and agreed that all the terms and conditions of said original contract of sale shall remain in full force and effect

(Testimony of Thomas S. Dennis.)

and unaltered in any other respect or manner than as herein specified.

In witness whereof, the said vendors and vendee have hereunto set their hands and seals this 28th day of June, 1920.

DONLAN & HENDERSON.

By ED. DONLAN.

TURNER, DENNIS & LOWRY LUMBER
COMPANY.

By L. X. JUNEAU,

Its Agent.

By the WITNESS.—I don't know who prepared this contract; Mr. Juneau had it prepared on my instructions. Neither of these notes have been paid. The defendant is now the owner and holder of these notes offered in evidence, Defendant's Exhibits "O," "N" and "J," and were such at the time of the commencement of this action.

At the time I was with Mr. Donlan in Chicago, we discussed at considerable length shipping cars on consignment plan, of shipping them out without previous orders. I repeated my former question to Senator Donlan as to getting an expression from him as to his attitude toward the market, when he wanted us to sell his lumber and what class of business he wanted, and suggested to him that the freight congestion was becoming much more acute and the signs all pointed to a very severe car shortage for the latter part of the year, and it seemed to me if he waited he would find himself then with a quantity of orders to fill but inability

(Testimony of Thomas S. Dennis.)

to secure cars, and I suggested that it would be much better to go ahead and ship some of his lumber out on a consignment basis to be sold after the lumber was in transit, and I said that on account of the congestion in freight a car [170—64] which was actually rolling on wheels commanded a price and was much more readily sold than lumber which had to be shipped from the mill; nothing was there agreed on at that time. We discussed the various elements and went into the consignment business, the advantages to be gained and the disadvantages that naturally arose to offset the advantages, among which was the demurrage and penalty charges. A consignment shipment is moved toward a given destination; it arrives at that destination before it is sold and it is necessary to hold it there awaiting the opportunity to sell it, and the railroads provide that cars held beyond a certain length of time at any point will be subject to demurrage charges.

Our next advance was made on August 3d on approximately 445000 feet; the exact amount was 446,636 feet, on which we advanced Donlan & Henderson at that time \$10.00 per thousand feet, which was represented by a draft; we applied the remaining \$10.00 per thousand feet on the balance due on their notes.

We did not, prior to the date of their first request for orders, particularly send any communication to them about orders—no letter specifically relating to orders; there were several of our pre-

(Testimony of Thomas S. Dennis.)

vious letters in which we referred to this subject of orders and requested them to advise us when they were ready to take on orders. The first of those letters I find was May 17th; the next letter seems to be ours of June 7th addressed to Mr. Donlan; in the meantime we received a request for orders. Defendant's Exhibits "Q" and "R" are letters sent by us to Donlan & Henderson relative to orders for lumber. They were dictated and signed by me and posted in the usual manner in due course of mail. Defendant's Exhibit "S" is a letter received by us from them; that was the first request we had from them for orders. [171—65]

Defendant's Exhibit "Q," then admitted in evidence without objection, is a letter from the plaintiff to the defendants, dated May 17, 1920, addressed to Sam W. Henderson, c/o Donlan & Henderson, as follows:

Defendant's Exhibit "Q."

Dear Mr. Henderson:

We have your favor of May 8th, enclosing the memorandum of stock on hand in the shed and planing mill. We are glad to have this, and will make up orders in the next few days to cover this stock, so you may get this out of the way.

We have been waiting a few days before sending you orders for the #4 boards, thinking that the market would indicate more clearly just what could be expected in the next several weeks, but so far there is no disposition for conditions to settle

down to a more stable basis. The market is quite badly upset with quite a wide range of prices being quoted.

We will send orders to you during the next few days for several cars of #4 boards, and we believe it would be just as well to get some of this low grade stock in consumption now, rather than hold it against possible advances of the market which might not materialize.

* * * * *

Defendant's Exhibit "R," then admitted in evidence without objection, is a letter from the plaintiff, addressed to Ben Henderson, c/o Donlan & Henderson, dated June 9, 1920, and reading as follows:

Defendant's Exhibit "R."

Dear Mr. Henderson:

I am mailing you under separate cover, copy of The Retail Lumberman, showing Big Ben, and some of the other scenes taken from your operation. I am afraid the article does not do justice to the matter, but was the best that I was able to get [172—66] through on account of the limited space that the Retail Lumberman had to offer.

Certainly trust that conditions are rounding out in good shape for you now, and that you are beginning to hit on all four cylinders.

Please let us know just as soon as you want orders, as we want to keep the Planing Mill fully occupied when you finally get to the place of taking on business.

(Testimony of Thomas S. Dennis.)

The market is in such a deplorable condition at this time that we are not disposed to hasten the issue in any way, as we look for a stronger price situation a little later on than now prevails, but of course when you get ready to start shipping, you want to continue operating, and we want to be sure that you have orders on hand to take care of your full running time.

* * * * *

Defendant's Exhibit "S," then admitted in evidence without objection, is a letter from Donlan & Henderson to the defendant, dated June 10, 1920, as follows:

Defendant's Exhibit "S."

Gentlemen:

We have been waiting before starting to plane, for your new matcher, but have just been advised that it has not been shipped yet, so are going to plane with the machines that we have until it comes.

Kindly send us orders at once.

By WITNESS.—June 17th was the first order sent. Defendant's Exhibit "T" is a copy of a letter sent by us to Donlan & Henderson, containing an order for lumber, the first order we sent them. [173—67] Defendant's Exhibit "T," then admitted in evidence without objection, is a letter from the defendant to Donlan & Henderson, dated June 17, 1920, reading as follows:

(Testimony of Thomas S. Dennis.)

Defendant's Exhibit "T."

Gentlemen:

We are enclosing our order 616-D car of #4 Western White Pine S2S at \$51.00 Elwood City, Pa. This is sold at a good high price. It isn't very often that we can get an order at such a high price as this, but we are giving you full benefit as per our agreement on the sale of this stock.

What we want now, is a large car and prompt shipment, therefore please get this order out at once and oblige.

By the WITNESS.—There were no further requests from the plaintiffs for orders; we exchanged correspondence in regard to orders and we have a letter from them stating that they are leaving the matter of orders more or less to our judgment. Defendant's Exhibits "U," "V," "W," and "X" represent some of the correspondence that took place between us relative to orders and shipments of lumber; there were other letters, however, besides these; the balance of the letters were after June 30, 1920. Defendant's Exhibit "H" is also a letter upon the same subject, sent by us to Donlan & Henderson, relative to shipments.

Defendant's Exhibit "U," then admitted in evidence without objection, is a letter from Donlan & Henderson to the defendant, dated June 16, 1920, reading as follows:

Defendant's Exhibit "U."

Dear Mr. Dennis:

I am in receipt of your letter of the 9th inst.
* * * You, no doubt before now have received
our request for [174—68] orders, on receipt of
which we will start the planer immediately. We
have lost no time sawing.

* * * * *

Defendant's Exhibit "V," then admitted in evidence without objection, is a letter from Donlan & Henderson to the defendant, dated June 18, 1920, reading as follows:

Defendant's Exhibit "V."

Gentlemen:

We are in receipt of yours of the 14th inst., and note what you say of the present market condition, and of a likely improvement within the next thirty days.

There is nothing that we particularly desire to move at this time, and in the matter of orders; we are leaving that entirely in your hands. While we are anxious to get things moving towards steady shipments, we do not care to ship anything that would not justify us, and do not want to make any sacrifices just to ship at this time.

You are in constant touch with the eastern market, and based on that, and if you think that there is anything particularly that we would be justified in shipping, send us the orders.

Defendant's Exhibit "W," then admitted in evi-

dence without objection, is a letter from the defendant to Donlan & Henderson (attention Mr. Ben Henderson) dated June 25, 1920, reading as follows:

Defendant's Exhibit "W."

Dear Mr. Henderson:

We have your letter of June 16th and 18th.

We are certainly glad to know you feel disposed to leave the matter of sales in our hands, as we assure you that we have your interest as much or more at heart, than our own. We [175—69] could sell some stock at present by forcing the issue, but the market is almost dead; and practically the only stock that is being sold is an occasional order which fits some customer's immediate requirements.

There is little speculative buying being done, but only at ruinous prices, and prices which we do not feel disposed to meet unless under pressure.

We are quite anxious to realize on some of the funds which we have tied up in our various contracts, but we feel that we are serving our Mill connections best by not pushing their stock too hard on the present market.

Defendant's Exhibit "X." then admitted in evidence without objection, is a letter from Donlan & Henderson to the defendant, dated June 30, 1920, reading as follows:

(Testimony of Thomas S. Dennis.)

Defendant's Exhibit "X."

Gentlemen:

You will find enclosed invoice for car of lumber shipped yesterday. We have included larch as per your instructions, marked.

This car was not loaded to capacity, in fact we are unable to secure small cars here. Would appreciate if you would include fillers with your orders so that we may ship loaded cars and realize more on the freight.

By the WITNESS.—Following the letter of July 2d sending the standard loading, such cars were loaded by Donlan & Henderson and sent out on the road to destinations that we wired them. There were possibly eight or ten cars of specific orders showing the ultimate purchaser sent to Donlan & Henderson prior to the time of the fire, [176—70] which were put on file and not shipped. Six of those were actually shipped to Donlan & Henderson. There were four other cars shipped prior to the fire and one subsequent, making a total of 11 cars that were shipped. We have a letter from them in which reference was made to what stock of lumber the last car was shipped from. It seems that the final car was loaded at their own instance, and they wired us that they had loaded the car, and instructed us to wire them shipping instructions. I am not able to state from what source that lumber was procured. The other ten cars were shipments made prior to the fire; the total quantity that was shipped in these

(Testimony of Thomas S. Dennis.)

ten cars was approximately 285,000 feet. Refreshing my recollection the quantity referred to was 283,129 feet. Up to the date of the fire advances had been made on a total of 3,338,412 feet. Deducting the ten cars shipped the balance would be the amount of lumber in the yard at the time of the fire. There was 39,345 feet shipped in the 11th car. If it should develop by later testimony that the lumber so shipped in the 11th car was salvaged from the fire, and was a part of that on which advances has previously been made, deducting the ten shipments and the 11th shipment would give the amount destroyed by fire on which we had made advances.

There are two letters received from Donlan & Henderson dated August 3, 1920; Defendant's Exhibit "Y" was received by our company on August 6th; Mr. Donlan's signature is attached to that; that was received by due course of mail by our company.

Defendant's Exhibit "Y," then admitted in evidence without objection, is a letter from Donlan & Henderson to Mr. Thos. S. Dennis, c/o Turner, Dennis & Lowry Lumber Co., dated August 3d, 1920, and read as follows:

Defendant's Exhibit "Y."

Dear Sir:

Mr. Juneau has been here, and on inventory, we find that [177—71] we sawed 879,670 ft. since last inventory including Saturday, July 31st. Mr. Juneau left a draft amounting to \$4466.36, while the

(Testimony of Thomas S. Dennis.)

lumber that has been covered after deducting the \$10,000 note due you this month.

I would like to have an advance on the balance of the lumber that is in pile and not covered. The total amount would be \$17,953.40 less \$10,000 amounting to \$7953.40 and deducting sight draft that we now leaving a balance of \$3487.00.

I would appreciate it if you would send us or instruct Mr. Juneau to give us a draft for this amount.

I also would like to have our August advance for August cut regardless of whether or not the piles are covered.

If you can see your way to do this, I would appreciate it very much, as our bills have been quite heavy the past few months.

By the WITNESS.—I personally received information regarding the fire the first week in August; I was on the boat trip up on the Great Lakes, and received a wire from our office. I received a communication from Mr. Henderson stating the circumstances surrounding the fire. I believe that letter has been identified previously; the date of it is August 12th. I have not been able to find the short letter of August 12th having reference to the insurance. I have never prior to the fire inspected the fire insurance policies taken out by Donlan & Henderson upon the lumber upon which we had made advances. At the time of the fire I did not have any knowledge as to what insurance had been taken. Defendant's Exhibit "Z" is, so far as I

(Testimony of Thomas S. Dennis.)

know, a correct copy of a letter received by our company from Donlan & Henderson after the fire.
[178—72]

Defendant's Exhibit "Z," then admitted in evidence without objection, is a copy of a letter from Donlan & Henderson to the defendant company, dated August 12, 1920, reading as follows:

Defendant's Exhibit "Z."

Gentlemen:

The insurance covering our yard is being adjusted satisfactory and your interests have been taken care of, proof of loss now being in our hands for signatures.

The loss of lumber leaves us with the following orders unfilled:

T-701-G. One car.

701-J. Two cars.

30002. One car. (Wire order.)

By the WITNESS.—The first advance after the fire was made by us on September 2d. Differing from the advances previously made, we advanced that one on the basis of \$20 a thousand in cash. The first reason for that was that Mr. Juneau requested authority from us to make an advance of \$20 a thousand, on the basis that Donlan & Henderson had asked for such an advance in order that they might resume their operations subsequent to the fire; the other was that we understood that the fire had wiped out all of the hang-over business

(Testimony of Thomas S. Dennis.)

before the fire, that we would be paid what was due us out of the insurance, that there was sufficient insurance to cover what was coming to us, aside from the first, and we agreed to make this advance on the representations that Donlan & Henderson were being seriously pressed for funds. At this time we advanced the full amount in cash without applying 50% of the advance due on that date to the notes, and Donlan & Henderson received the full \$20 a thousand feet on the cut made up to September 2d. The amount [179—73] of that advance was slightly in advance of 500,000 feet; it was exactly 514,499 feet. The next advance was made on September 30th; we advanced the \$20 per thousand straight; the amount of that advance was 401,315 feet at \$20 per thousand. At the time that advance was made I was at Pablo; had been there just a few hours, having gone there from Missoula. I left Kansas City about September 20th and came straight through to Missoula, where I saw Mr. Donlan. Mr. Donlan advised us that in the meantime drafts would come from one of the insurance companies for part of the insurance and we repaired to his bank at which he was to pay us the insurance which they had received. Mr. Donlan advised me that they had already received \$10,000 of the insurance from the Seattle company, which came very shortly after the fire; that was the Inter-Insurance Exchange. This

(Testimony of Thomas S. Dennis.)

they had used because they were so hard pressed for funds in getting started after the fire; he advised that there was \$70,000 waiting at the bank, coming from the \$70,000 insurance placed with the Old Line companies. He said, "I am going to give you \$60,000 of this and use the other ten, and we will pay the balance we owe you when the rest of the money comes." So we went to the bank and the drafts were there and they were drawn in our names jointly; I signed the draft; Senator Donlan did likewise and they were turned over to the banker who then issued drafts to us for the sixty thousand. Mr. Keith asked me not to deposit that right away until the releases which we had signed were returned to San Francisco, and I advised him that this was going to be mailed to Kansas City and it would be several days before it cleared, and he stated that that was satisfactory. It was in due course cashed.

In a day or so I went up to Pablo and had a talk with Mr. Henderson in regard to our affairs and our account and suggested [180—74] that I brought my records along with me and it would be advisable for us to compare our records and arrange a statement, showing what the status of our account was at that time; this took place at the mill office at Pablo; this was somewhere around the 25th of September. Mr. Henderson advised that Mr. Rapp was their bookkeeper and familiar with their rec-

(Testimony of Thomas S. Dennis.)

ords and suggested that Mr. Rapp and I go over these records and accounts together, which we did. He obtained his books of the various items and I showed him what our balances were against his and they seemed to agree substantially, and as a result of our conference we made out the statement purporting to show the status of our account at that time. We made a single statement and a copy from that. Mr. Rapp had manila memorandum paper in his office which he allowed me to use. Defendant's Exhibit 1, consisting of three sheets, is the paper on which that memorandum was made; that is the memorandum I retained that I made at that time; Mr. Henderson was present when this was made.

After the statement had been prepared, I handed a copy of it to Mr. Henderson and asked him to look it over, which he did; I then asked him if it was satisfactory and he said he didn't understand about the item of insurance; I asked him just what he meant and he said he didn't understand they were to protect us for a margin of \$5 a thousand on the insurance, which we had charged to him on this statement. I told him that as he had diagnosed the contract he apparently was entirely familiar with that because the matter was very clearly shown in the contract, and we were to be protected for \$25 a thousand on the lumber on which we had advanced. I went on to explain to him the reason

(Testimony of Thomas S. Dennis.)

for the necessity. He said that seemed logical; he understood how that was, but he hadn't understood it at the time the contract was made, and had he understood it [181—75] then he would have taken out more insurance on the lumber. I told him that the statement was subject to final revision, that it didn't contain the final adjustment on cars which were shipped, which would not be available until the freight bills and adjustments came in from the customers. The adjustment refers to these 11 carloads of lumber shipped; those cars were all sold at delivery prices f. o. b. the purchasers, and in handling those on our books we would set a credit to Donlan & Henderson's account to offset the debit which we set against the customer; in other words we gave Donlan & Henderson credit for our invoice price delivered to final destination, and in adjusting our account with them it was necessary for us to have the last freight bill from the customer in order that we might determine how much freight entered into the price, which was to be deducted in order to establish the f. o. b. mill price which had been obtained for the lumber. Aside from the item of freight on these cars I think there was nothing of major importance not available at that time; there may be minor corrections which either of us would have found, but nothing of a material nature. After this explanation of the \$5 a thousand feet insurance had

(Testimony of Thomas S. Dennis.)

been made by me, I don't recall that Mr. Henderson made any further objection to the statement as prepared. At that time I understood and had been advised that they had received \$70,000 from the Old Line companies and \$10,000 from the Seattle company.

We discussed quite extensively while I was in Missoula and vicinity what should be done on receipt of further sums from the insurance companies; that was at the time this statement was made and several days later when the advancement was made on the September 30th inventory. Mr. Henderson told me they were having some trouble getting the balance from the Seattle [182—76] Company; on receipt of that they agreed to pay us the balance which they owed us under this compilation which we had gone over; but the money did not come and it was necessary for me to go west, so I told Mr. Henderson as we were carrying considerable insurance ourselves with the same insurance agency on operations we had in Idaho, it was possible I might be able to bring some pressure to bear to hasten up the final adjustment, and he told me to do so, and on his part he promised to notify me immediately when he got anything from them himself, and I left Pablo and went on west to Spokane. When I was in Missoula Senator Donlan told me the balance would be paid with the remaining insurance money as soon as it was re-

ceived, and Mr. Henderson made the same statement when I was at Pablo. I know only in a general way when these subsequent insurance moneys were received by them.

Thereupon the hour of five o'clock P. M. having arrived, court was in recess until 9:30 o'clock A. M. the following day, at which time the direct examination of the witness was resumed.

Defendant's Exhibit 1, then admitted in evidence over the objection of the plaintiffs, is in words and figures as follows:

Defendant's Exhibit No. 1.

Loans		(Sheet 1)
4/15—Due July 16 @ 7%		10,000.00
4/15— Aug. 16 @ 7%		10,000.00
6/28— Sept. 1 @ 8%		6,082.24
6/28— Oct. 1 @ 8%		5,000.00
Advances on lumber		
4/15 2,000,000 ft. @ 20.00		40,000.00
6/28 (891,776 " @ 20.00	17835.52	
8/ 3 (446,636 " @ 20.00	8932.72	
(	26768.24	
(Less 10.00 per M applied on loan	13384.12	13,384.12
		<hr/> 84,466.36
[183—77]		
Plus insurance at 5.00 per M on the lumber		
advanced on 3,338,412 @ 5.00		16,692.06
		<hr/> 101,158.42
Interest to 10/1		2,271.58
		<hr/> 103,430.00
Credits.		
Advance and insurance on shipments prior to fire		
—284,023 ft. @ 25.00		7,100.57
		<hr/> 96,329.43
Bal. due, including interest to Oct. 1st, Less		
Draft		60,000.00
		<hr/> 36,329.43
Bal.		

(Testimony of Thomas S. Dennis.)

(Sheet 2)

Shipments			
Date	Car Number	Quantity	
6/29	(87426 Pa.	21038 ft.	21048
7/ 1	(75494 N. H.	28844 "	27938
7/ 1	(37558 B. & A.	25597 "	25597
7/ 9	(38703 I. C.	26269 "	26269
7/10	(40368 B. & M.	28510 "	28510
7/12	(56461 N. Y. C.	34272 "	34272
7/12	(155093 R. I.	36937 "	36937
7/30	(130074 Soo.	27699 "	27699
8/ 1	(61665 N. & W.	27200 "	27200
8/ 2	(558814 Pa.	27657 "	27659
			<hr/>
			284023
8/12	Shipment		
	Car #78564	39345 ft.	
			<hr/>

(Sheet 3)

Interest		
60,000.00 @ 7% from 4/15 to 10/ 5½ months		1925.00
8,917.76 @ 7% From 7 /1 to 10/1 3 months		156.06
11,082.24 @ 8% From 7/ 1 to 10/1 3 months		221.64
4,466.36 @ 7% From 8/ 1 to 10/1 2 months		52.10
<hr/>		<hr/>
84,466.36		2354.80

Interest Credits.

Shipments 6/29 to 7/ 1— 75479 ft. @ 20.00	1509.58
Shipments 7/ 9 to 7/12—125988 ft. @ 20.00	2519.76
Shipments 7/30 to 8/ 2— 82556 ft. @ 20.00	1651.12
<hr/>	
1509.58 @ 7% From 7/1 to 10/1, 3 months	26.42
[184]	

By the WITNESS.—Defendant's Exhibit 2 is an exact carbon copy of the telegram sent by our company to Donlan & Henderson October 28th, 1920. The original wire was sent on that day in the usual manner through the Western Union Telegraph Company.

(Testimony of Thomas S. Dennis.)

Defendant's Exhibit 2, then admitted in evidence without objection, is a Western Union Telegram, dated October 28, 1920, from the defendant to Donlan & Henderson, reading as follows:

Defendant's Exhibit No. 2.

Inter Insurance Exchange advise forwarded you twenty thousand Tuesday our financial requirements are very urgent and pressing and we trust you will forward this amount to us quickly will greatly appreciate your co-operation kindly wire us definite advice.

By the WITNESS.—I have the telegram received in reply to this one; Defendant's Exhibit 3 was received by us on October 30th, delivered to us by the Postal Telegraph Company of Kansas City.

Defendant's Exhibit 3, then admitted in evidence over the objection of the plaintiffs, is a Postal Telegraph telegram, dated Oct. 30, 20, from "Donlan" to the defendant company, reading as follows:

Defendant's Exhibit No. 3.

Nothing recd to date from Inter Insurance Exchange Seattle will forward soon as get it Will advise you. [185—79]

By the WITNESS.—On the 8th of November, 1920, an advance was made by Mr. Juneau in the nature of a draft. 699,972 feet of lumber had been scaled from September 30th inventory up to that time. \$20 per thousand feet upon that amount

(Testimony of Thomas S. Dennis.)

would be \$13,999.44. The draft for that amount was not paid in cash by us, because at the time the draft was presented to us Donlan & Henderson owed us considerable more than that amount, which debt was past due, and we applied this \$13,999.44 as a credit against the balance of their indebtedness to us. This was after the time that we had made the two advances of a full \$20 per thousand feet in cash; those advances were greater than called for by the contract, and had been made in September.

The bunch of invoices marked Defendant's Exhibit "B" are the invoices covering the shipments of cars of lumber by Donlan & Henderson; they are in their proper chronological order. The first three cars of lumber differed from the remainder by reason of the fact that they were shipped on orders furnished to Donlan & Henderson, showing that the sale had been made prior to the shipment of the car, showing the consignee and the price on which they were sold, and final destination; they further differ by reason of the fact that on these three cars Donlan & Henderson drew on us for the estimated net proceeds coming to them after deducting the estimated freight and our commission in line with the provisions of the contract, and on no subsequent shipments did they draw on us. The three cars were covered by one draft, which was honored. The freight only was an estimate; a person that knew the freight would necessarily know the commission, as the commission would be figured on the

(Testimony of Thomas S. Dennis.)

exact net proceeds, and at the time the draft was drawn, the freight not being known, they estimated the freight. Our [186—80] commission of 15% would be on the net proceeds less the freight; the freight would not be known then. After the freight returns had been received by us, I think on one of those cars there was still a balance due them, and on the other two the freight bills established the fact that they had overdrawn on them. The three cars were overdrawn approximately \$50, as shown by final settlement. For the remainder of the cars they didn't draw drafts upon shipment. As the cars were shipped they were then entitled to a credit on the footage in each car of \$20 per thousand feet. After the returns came in from the ultimate purchaser, remittance was then made to Donlan & Henderson in detail, setting up what charges had been made against them on the shipment and what balance was due them in settlement of each individual shipment. The report showing the freight was all covered on each individual car by the individual remittance on that car to Donlan & Henderson. With the remittance there was no invoice of ours; they had been furnished with a copy of the invoice when the sale was made, and accompanying this remittance of ours to them was the original paid expense bill sent in to us by the purchaser for credit. Those were forwarded to Donlan & Henderson in the regular mail. I have not complete copies of them. Defendant's Exhibit 4 is a report

(Testimony of Thomas S. Dennis.)

covering the freight and proceeds on one of these cars of lumber, except that it does not include our statement of settlement transmitted to them at the time the expense bill was sent to them. That refers to the first car which they shipped. At counsel's request I segregate from that bunch of papers the first three cars that were shipped.

Car No. 38703, Illinois Central—we gave Donlan & Henderson credit on that car for \$1665.41; we debited them with freight in the amount of \$267.90, excess freight charges \$48.41, [187—81] reconsignment \$5, war tax on reconsignment 15¢, 15% commission to us \$209.63, credit to their account of \$20 per thousand covering the amount originally loaned on shipment \$525.38, 2% cash discount on the balance \$23.76, balance set to their account of \$585.18. That was of date November 27th and is all summarized in the paper which I have here, and which is a carbon copy of our settlement which we furnished them at the time we sent them the original expense bill previously referred to. That is Defendant's Exhibit 5.

Defendant's Exhibit 5, then admitted in evidence without objection, is a tabulated statement headed with the name of the defendant company, dated November 27, 1920, addressed to Donlan & Henderson, and tabulating the figures given in the preceding paragraph of the witness' testimony.

By the WITNESS.—The original of that was mailed in due course of business to Donlan & Hen-

(Testimony of Thomas S. Dennis.)

derson, together with the freight bill, which was receipted by the railroad company at its final destination. This was mailed to Donlan & Henderson on December 18th. There was an overcharge on the freight amounting to \$48.41, and in making the settlement with us the purchaser deducted the full amount of the freight bill and in making our settlement with Donlan & Henderson we also deducted the full amount of freight charged, as shown on the overcharge item in freight of \$48.41. We sent them a form and advised them if they would return the original expense bill we would remit to them the amount of overcharge and use the expense bill as a basis for filing a claim against the railroad for the overcharge; that was not done. [188—82]

The next car was No. 40368 B. & M.; the total credit set to Donlan & Henderson's account on this car was \$1630.53, from which we deducted freight \$346.47, demurrage \$231, reconsignment of \$10, war tax on demurrage and reconsignment \$7.23, 15% commission to ourselves \$192.61, a credit of \$20 per thousand to them covering the amount of the original loan, total \$570.20, 2% cash discount \$21.83, leaving a balance due them of \$251.19. Defendant's Exhibit 6 is a carbon copy of such memorandum sent to Donlan & Henderson by us; on December 18th; the freight in this car was computed as it was in the other case. The charge of \$231 covers

(Testimony of Thomas S. Dennis.)

the demurrage assessed by the railroad company while the car was standing on the track at recon-signing point waiting a satisfactory sale of the lumber. This was what is commonly known as a transit car. We found a customer for this car and made a sale as soon as we were able.

Defendant's Exhibit 6, then admitted in evidence without objection, is a statement headed with the name of defendant company, dated November 27, 1920, addressed to Donlan & Henderson, and tabulating the figures given in the preceding paragraph of the witness' testimony.

By the WITNESS.—Defendant's Exhibits 7, 8, 9, 10 and 11 are similar carbon copies of reports sent to Donlan & Henderson, showing the proceeds and return on the cars shipped, sent them in due course of business, on December 18th, 1920. The freight in each case which was deducted was ascertained in the same manner as the freight mentioned heretofore on the cars I testified to. There were also overcharges in freight on several of these cars similar to the one I previously described, which were deducted in our settlement with Donlan & Henderson; we followed the same [189—83] procedure, sending them a copy of our corrected freight and the freight charged, with the statement that if they would return the original expense bills to us we would file our account for overcharge; that was not done. The total of these overcharges on freight on the three cars was about \$199; on car 155093,

(Testimony of Thomas S. Dennis.)

\$94.44; car 54641, \$48.06; car 61665, \$56.04. The demurrage mentioned in Defendant's Exhibits 7, 8 and 11 was in each case a charge incurred under the same circumstances previously described with reference to the other car; those were transit cars, and the demurrage was incurred during the time we were finding a customer for them.

Defendant's Exhibit 7, then admitted in evidence without objection, is a tabulated statement from the defendant company to Donlan & Henderson, dated November 27, 1920, showing a credit "Your invoice" \$2114.56, and debits, freight \$536.38, excess freight charges \$94.44, war tax \$4.62, demurrage \$144, reconsignment \$10, commission 15% \$236.73, credit \$20 per M. on 36937 ft. \$738.74, discount \$26.83; Bal. due mill \$322.82.

Defendant's Exhibit 8, then admitted in evidence without objection, is a tabulated statement from the defendant company to Donlan & Henderson, dated December 31, 1920, showing a credit "Your invoice" \$1985.56; and debits, freight \$521.27, excess freight charges \$48.06, war tax \$6.93, demurrage \$224, reconsignment \$7, commission 15% \$219.64, credit \$20 per M. on 34272 ft. \$685.44; Bal. due them \$257.64.

Defendant's Exhibit 9, then admitted in evidence without objection, is a tabulated [190—84] statement from the defendant company to Donlan & Henderson, dated December 31, 1920, showing a credit "Your invoice" \$1218.76; debits, freight \$302.67,

(Testimony of Thomas S. Dennis.)

commission \$137.41, credit \$20 per M. on 27699 ft. \$553.98, discount \$15.57, Bal. due mill \$209.13.

Defendant's Exhibit 10, then admitted in evidence without objection, is a tabulated statement from the defendant company to Donlan & Henderson, dated

November 27, 1920, showing credit "Your invoice \$1217; debits, freight \$306.43, 15 % commission \$136.59, credit \$20 per M on 27659 ft. \$553.18, discount \$15.48. Bal. due mill \$205.32"; with the notation "Amount of \$205.32 transferred to Fire Adjustment Account as at 9/21/20."

Defendant's Exhibit 11, then admitted in evidence without objection, is a tabulated statement from the defendant company to Donlan & Henderson, dated November 27, 1920, showing credit "Your invoice" \$1687.57; and debits, freight \$342.48, excess freight charges \$56.04, war tax \$.06, demurrage \$2, commission 15% \$201.76, credit \$20 per M on 27,200 ft. \$544, discount \$22.87; Balance due mill \$518.36.

By the WITNESS.—The total credits shown here represent the sale price at the final destination which included freight; that is what the customer paid for the lumber; and he paid the freight remitting the balance to us. The demurrage was paid by the customer as a freight charge for the car. The figures marked in each case "your invoice" represented the full price obtained by our [191—85] company for each of these cars of lumber; to the best of my knowledge they were the highest prices obtainable by us.

(Testimony of Thomas S. Dennis.)

Explaining the reconsignment charge, that is a car service charge imposed by the railroad companies on cars consigned to one destination and ultimately reconsigned to another destination. It is the custom of the railroads in cases of all cars which have changed in their destination.

In some instances in the freight bills the one document covers both the carrying charges and the demurrage charges, and in other instances the carrying charges are shown on one document and the demurrage on another. Defendant's Exhibit 12, consisting of seven sheets, all represent the receipted expense bills, showing the various items of car service, reconsigning charge and demurrage, deducted in our settlement with Donlan & Henderson. They were received by us from the customer to whom we sold the car, in each case. We used these as a basis for making our charge against Donlan & Henderson, and furnished or forwarded these expense bills to them with the usual settlement blanks. If the lumber is purchased by the customer on the basis of price delivered at his station, it is the custom in the lumber trade for the customer to pay the freight, receipt the freight bill and remit them to the person from whom he purchased the lumber; these cars were all sold delivered to the customer's track, and these freight bills were then remitted pursuant to the universal custom in the lumber trade in cases of that kind, to us; they all show the receipt of the railroad company.

Defendant's Exhibit 12, then admitted in evidence

(Testimony of Thomas S. Dennis.)

without objection, consists of seven sheets of paper, severally on the following import: Sheet No. 1, a freight bill showing total charges on car I C 38,703 of [192—86] \$5.15; Sheet No. 2, a freight bill showing total charges on car B & M 40,368 of \$178.19; Sheet No. 3, a freight bill showing total charges on car B & M 40,368 of \$70.04; Sheet No. 4, a freight bill showing total charges on car C C & St. L 56,461 of \$798.90; Sheet No. 5, a freight bill showing total charges on car 56,461 of \$20; Sheet No. 6, a freight bill showing total charges on car 56,461 of \$4; Sheet No. 7, a freight bill showing total charges on car 61,665 of \$410.85.

By the WITNESS.—With respect to the cars on which demurrage was charged, our company made the most expeditious disposition we could without sacrificing the value of the lumber. To the best of my knowledge, the net price we obtained, after deducting the demurrage, was the highest obtainable price under the circumstances, considering as one of the circumstances the fact that these cars were so shipped that they were to be sold in transit. I have been engaged in the lumber business for 16 years, and the buying and selling of lumber for about nine years. About two years of that experience has been in connection with western pine and lumber such as that produced in Montana.

I testified yesterday that in my conversation with Mr. Donlan he offered to sell the lumber which he had purchased from Smead on the July, 1919, list basis. Quantities of lumber such as that

(Testimony of Thomas S. Dennis.)

at Pablo in the Donlan & Henderson yard at the time of the fire have been sold in bulk. The effect of such a sale upon the market value of the lumber would depend quite considerably upon the conditions surrounding the sale, as to whether or not it anticipated an established price over an extended period of time, what the terms of payment were, and so forth. The price in bulk of that quantity of lumber which [193—87] would be paid on the market would necessarily be considerably lower than the price that could be obtained for individual carload lots of the same lumber shipped on board cars. A great many elements would enter into that; one is, it would be impracticable to ship such a volume of lumber in the limited length of time; it would require considerable time to ship it and the purchaser would have to assume the risk of the market changing during that period, and there would be a considerable amount of expense involved in marketing that lumber to its ultimate destination; there would be an uncertainty as to the quality of the lumber after it was thoroughly seasoned and milled and loaded on the car; there would be a great many items contained in bulk sales of that kind which would not be readily marketable. During the spring and summer of 1920, we were engaged in purchasing or negotiating for stocks of lumber in bulk or as they come from the mill in western Montana in similar character to those which existed up there at the Donlan & Henderson mill.

(Testimony of Thomas S. Dennis.)

I know that such sales in bulk of the entire output of a mill as it came from the mill were being made at that time. There were variations in the market value of such stocks of similar quantity and quality at that time and in the month of August, 1920; I personally know of some sales made as low as \$26 per thousand for the mill run f. o. b. their mill to the purchaser's order, and I know some sales made as high as \$30.50 per thousand. I would say that a liberal estimate of the high market value of the bulk stock of lumber, mill run, of the character of that at Donlan & Henderson's plant, planed and loaded on board car according to the purchaser's requirements, on the 3d day of August, 1920, would be \$30. I believe that value would cover a general run of lumber, some of which would be dry and in shipping condition and the balance of which would come [194—88] into shipping condition at a later date. Our company made three purchases of bulk mill run stocks during that period similar to those stocks at Donlan & Henderson's mill. In the latter part of January we made a purchase of that nature from the McKenzie Brothers of the output of their mill from January to May 1st at Hot Springs, Montana, for \$30 per thousand delivered on board cars at mill and loaded according to our order; the latter part of January we made a similar purchase from Charles Beardmore at Priest River, Idaho, for \$27.50 per thousand, mill run, dressed and loaded on board cars according to our order; and

(Testimony of Thomas S. Dennis.)

the latter part of August we made a similar purchase from the West and Duffy Company at Spokane of some million and a half feet that they had in pile at Priest River, Idaho. The latter purchase was substantially #2 common and a better shipment. For that we paid \$30.50 per thousand milled and loaded to our order on board cars.

I was well acquainted with the lumber market for western white pine from November, 1919, to January 1st, 1921; that includes the period of time during which this lumber was being manufactured. The market was in a very chaotic condition over practically the entire period; in November an immense amount of buying started which resulted in a runaway market, extending through November, December, January and possibly the first half of February; during that period buyers of lumber were quoting almost any offer over the asked price of mills to be given preference on stock. That condition extended up to the early part of February, after which it began to subside somewhat. The market apparently had played itself out, at least began to die down somewhat and buyers began to settle down and get their breath; only small opposition was springing up over the country to keep the high prices up; quite a good many retail [195—89] associations at their annual conventions adopted resolutions condemning the manner and the fellows for running the prices up and along about the middle or 20th of February the Weyerhaeuser Sales Company, one of the big fellows in the

(Testimony of Thomas S. Dennis.)

western pine market, issued a new price list and published to the world that they were going to stabilize lumber prices and were making a cut of 30% in their prices which would be guaranteed against advance until June 1st.

The announcement of the freight increase for the latter part of August had a tendency of decreasing the purchase of bulk lots in the west and increasing their purchase in the southern states on the theory that the increase in freight rates would establish a sort of bar against western shipments; however, it stimulated buying of cars which could be shipped out in 30 days to six weeks on the theory that if they could be shipped before the freight rate went into effect it would give the purchaser the advantage of that increase in freight.

Western white pine produced in Montana and Idaho belongs to the same family; there is a difference to some extent between them and between the western white pine of different sections of Montana; however the general nature is substantially the same, and on the average the same so far as value is concerned.

In taking the lumber which has been graded in the yard and running it through the planer, it might be possible to increase the grade if the lumber was very loosely or poorly graded in the green stage, and when handled through the sawmill it would naturally shrink in value by the time it had been sawn and had been run through the

(Testimony of Thomas S. Dennis.)

planing mill, by reason of certain defects which developed during that time. That is the undisputed rule in the case of lumber such as this. [196—90]

I haven't seen the full bill of particulars but only that portion which referred to the 2,000,000 feet of lumber. I have figured what per cent of that 2,000,000 feet is contained in the varying grades of lumber there specified. As itemized in the bill of particulars it develops 18½% of selects, 26% #1 and 2 common, 20% #3 common, 10% #4 common, 25½% of dimension. I mentioned the highest values first and the lowest last. I looked over the timber and the lumber at the Donlan & Henderson plant when I was there, and am familiar with the general character of it. From my experience as a lumberman I don't believe it would be physically possible to obtain these percentages of grades from a milling of timber such as was at the Donlan & Henderson company. What it would produce in percentages would depend to some extent on how carefully it was manufactured and taken care of; I believe the common average where a mill turns a portion of their product into dimensions would be substantially 12 to 15% of selects, about 10% shop, which they are manufacturing at that point, about 20% #1 and #2 common, about 30% #3 common, and about 10% #4 common, and probably about 15% of dimension.

Cross-examination by Mr. PARSONS.

I am 33 years old and have been connected with

(Testimony of Thomas S. Dennis.)

this firm since its inception in January, 1920. From the present back I have had 16 years' experience in the lumber business. Nine years of that has been in the practical purchase of lumber, the last few years principally confined to the southern field. I have been purchasing for different companies I represented during that period. I know what a purchaser is, and I know what an order is, and what a buyer is. As to knowing the difference between a seller and a vendor and a vendee and a purchaser, I have never given consideration to the terms vendor and vendee [197—91] until recently. Our purchases prior to our operations in the west were all single car lots of small amounts in certain cars. I have never heard in a particular way of the words vendor and vendee in my experience; I have heard the terms; I have never given any consideration to what they conveyed to my mind. It was shown me probably but forgotten after I heard it. I know what the passing of title means; I knew all the time what the word purchaser naturally meant, and what "price paid" meant. I don't think I ever heard the term "vendor's lien" until just recently; I have heard of liens on lumbering; I never heard of any particular kind, just the term lien, or mechanic's lien, which is common in the retail business.

I had met Mr. Donlan several times previous to coming out here; in a business way he was a stranger to me; so was Mr. Henderson; I judge

(Testimony of Thomas S. Dennis.)

that I dealt with him the same as I would with any other stranger; I looked after my interests and expected them to look after theirs. The first proposition Mr. Donlan made was not to sell us the entire output there, all the lumber manufactured and piled and thereafter to be manufactured and piled, at a flat rate of \$42 a thousand; nothing of that kind said at all to my knowledge. I didn't make any offer of purchase for this property at all in our prior negotiations. We purchased two lumber yards up to that time, both in January, and one in August, after that.

Prior to the signing of the instrument we were in a room in the Palace Hotel when we were talking over these terms. He offered the contract to us on the basis of the July, 1919, basis price list; that is, he offered to sell it to us. That July, 1919, price would vary from \$42 depending somewhat on the percentage of grades. Such grades as I find here in the bill of particulars the 2,000,000 feet figures on the July, 1919, [198—92] list, \$35.50 or \$37.50, I should say. After we refused to buy outright we talked over our commission basis and the people we were going to sell it to; and we talked about the insurance feature of it. I suppose the fact is I went over every part and parcel of that contract and every aspect of it very thoroughly from my point of view, and he from his. His suggestion for the next morning was to go to his lawyer. I don't recall that he mentioned his name. He did not tell me that he knew a

(Testimony of Thomas S. Dennis.)

lawyer here who gave those matters consideration, had done a little work for him in the past and that I had better go up and give it to him; he asked me if I had a lawyer to take the matter to and I told him I was not familiar with the lawyers here. I felt that I knew about writing these contracts myself, what few we had made. I had written them out and I told Mr. Violette, who prepared this contract, that I, myself, had been in the habit of making what we had made of these contracts. I did not make a draft in lead pencil of the proposed contract; Mr. Donlan and I both discussed the terms of our agreement; my recollection is that Mr. Violette sat there and took it all down. Then Mr. Donlan and I left.

I am not certain that I came back before the contract was completed; it was completed that day. I am not certain that I read over the portion that Mr. Violette had completed in typewriting and returned the second time for the completion of the contract. There was no suggestion whatever made of vendor's lien; it is not a fact that I was very insistent that the words vendor and vendee be used. As to insisting that the words buyers and purchasers be used, I made no suggestions regarding the language or wording of the contract. I wasn't particularly insistent that it should be a sale. I made the stipulation that the title and possession should pass to us as security for [199—93] the money we were to advance. I don't recall whether I insisted in

(Testimony of Thomas S. Dennis.)

this instrument that it was as security; if I didn't do that I don't know why I didn't. As to the suggestion of the vendor's lien coming from Mr. Violette there was no suggestion of any kind from any of us in regard to the wording of the contract. Either Mr. Donlan or Mr. Violette suggested that in passing title to us they were relinquishing their rights and some provision should be made to protect their still interest in the lumber; I don't recall the words used in that respect.

After the contract was written I read it; I understood the general intent of it. As I expressed it yesterday it seemed to cover the case exactly. What I intended to say was that the contract apparently expressed clearly what each of us was to do. I knew distinctly I had not bought it. I had no intention of fooling the public by taking it under those circumstances. I didn't ask that the contract state that I was the vendee; I required the contract should show that the title passed to us because we were lending money on the lumber and we wanted some security for the protection against that loan. I think I made some remark complimenting Mr. Violette very highly in drafting the contract; I don't recall whether I told him it was exactly what I wanted; I made no remark about it covering the situation at all. After Mr. Donlan and I read it over then Mr. Henderson came in, and it is my recollection that he read it over; then we all signed it. I don't believe Mr. Donlan signed it; I think

(Testimony of Thomas S. Dennis.)

Mr. Henderson signed for his company; there was some explanation that Mr. Donlan had agreed that Mr. Henderson sign all these mill operations.

Subsequent to signing it I went out to the mill. My recollection is that when I got to the mill I found that Mr. Henderson had not completed his deal with Smead. As to whether [200—94] the Smead deal was completed and the insurance taken out on the 15th of April, before we signed the contract, I have no knowledge of when the insurance was taken out; I know for some little time after Mr. Donlan and I had signed the contract there was a dispute between Mr. Donlan and Mr. Smead as to the exact inventory, and it was necessary for them to agree on someone to inventory the lumber before they could ship any of it out. I am not certain that I paid the money or drew the drafts of the 15th, the day before I signed the contract; I don't think it is true but it may be; I doubt if the drafts are dated on the 15th; I think the contract was signed on the 16th.

After I signed this contract I was out to the mill talking to Mr. Henderson. I don't recall whether I had this paint brought out at that time or the time we had some lettering out there. I don't recall any conversation where Henderson said to me, "I would like to get enough of this lumber to build my camps; otherwise I will have to saw it," and I said to him, "Well, if you want any of that lumber you will have to take it out before it is stencilled." I don't at all recall that

(Testimony of Thomas S. Dennis.)

it happened. I didn't have a little conversation about the contract there and Henderson looked at section 8 of it and said that he hadn't understood before to-day how my construction was on that. He never at any time said that. That controversy was in the latter part of September; I know he didn't refer to the contract at that time; he referred to the statement I gave him showing that we charged him \$5 a thousand for the insurance, and then made that remark. I said, "If you have read your contract you certainly must be familiar with that clause."

When I went home I took the contract back; I don't recall that the company saw it; I was in Chicago and I don't know if they gave any thought to it. As far as I know the contract expressed [201—95] what Donlan & Henderson were to do; I am not at all familiar with what might have actuated their wishes in regard to it. In other words, I don't know whether there was any mistake on their part or not. My testimony is that I didn't understand the legal wording of it; as to whether I understood the legal effect of it, I understood it set up what we were each to do, and as far as that was concerned it seemed to cover it entirely.

I had nothing whatever to do with drafting of the contract, Exhibit "P," affirming the contract and the words referring to ourselves as the vendees and the parties as vendors and vendees. To the best of my knowledge our agent, Mr. Juneau, had

(Testimony of Thomas S. Dennis.)

that done in behalf of our firm, as agent; he had authority to do that; he did not have authority and represent us here for all purposes; he represented us in all our transactions except financial transactions; he was the agent of the corporation. As to whether there is any complaint that Mr. Juneau made a mistake in our behalf in speaking of purchaser and vendor and vendee in the same contract, I don't recall if the supplemental contract has anything to do with vendor and vendee. It was not intended that this would modify the original contract whatever; simply to cover the method by which our additional loan was to be paid.

I have no particular complaint about the contract; I am simply surprised at the impression that is trying to be placed on it, the impression that plaintiffs' counsel are seeking to put on it. That is the only complaint I have of the contract as far as I know. As to whether, so far as I know, Mr. Violette didn't make any mistake, I have no idea where he got his words; we didn't discuss them; I don't know that he made a mistake; I don't know whether he said it deliberately, or some other motive. I haven't given any serious thought to whether it was trying to [202—96] get the best of us.

On November 4th, 1920, the plaintiffs owed us, including the advance we made after the fire, approximately \$54,000. The insurance which they collected amounted to \$130,000. I did not demand

(Testimony of Thomas S. Dennis.)

all of that insurance at any time. The letter dated November 4th, 1920, to Donlan & Henderson, Plaintiffs' Exhibit 11, seems to be mine. In that letter I didn't demand the insurance of \$130,000. Explaining why I say "all of the insurance," and I knew that both policies were outstanding, I will say that when I was in Missoula the latter part of September, and Mr. Donlan paid to me through his banker, the \$60,000 of insurance money, it was agreed and understood that there was still a balance due on the advance made up to and including the date of the fire, and Mr. Donlan told me he was going to give me this \$60,000 of the \$70,000 that he had collected then, and the balance would be paid to me when they collected the balance of the insurance money; when I went to Pablo and had my understanding with Mr. Henderson there as to our accounts, showing that, after deducting the \$60,000 that they had paid us, they still owed us some \$36,000, without anticipating our September first advance, Mr. Henderson also assured me that when the balance of the insurance money arrived they would pay me the balance of that insurance. When I refer to the insurance it is very apparent that I refer to the balance of the insurance, and all the balance of the insurance which had not then been collected. Perhaps I did not say so absolutely, but it is hardly likely that I would be asking for something which had already been collected; I was demanding the balance they owed us, to include our amount.

Plaintiff's Exhibit 11, then admitted in evidence without objection, is a letter from [203—97] the defendant company to Donlan & Henderson, dated November 4, 1920, reading as follows:

Plaintiffs' Exhibit No. 11.

Gentlemen:

We took the liberty of writing you again by day message as per copy enclosed, asking that you wire at our expense reference to the insurance remittances.

We would not do this, except that the situation is becoming very urgent and serious with us as we have a note coming due at the bank to-morrow for \$25,000.00 which we have arranged to take up, anticipating that we would have all of the insurance money in our possession by this time as the writer was given assurances when in Spokane by the Inter-Insurance Exchange that all of these funds would be in your possession before October 28th.

We wired them after receiving your wire several days ago stating that the check had not yet been received, and have their reply that the check went forward last Tuesday week as they had previously stated. It has occurred to us that the check was delayed enroute and we are very hopeful that in the meantime you have received it and forwarded it on to us as we will be seriously embarrassed if this does not arrive in time for us to take up our note to-morrow.

Please pardon our insistence in regard to this situation but we cannot impress upon you how

(Testimony of Thomas S. Dennis.)

stringent in the financial situation at present in the middle-west and it is all that we can do to take care of our contract obligations at this time, even where we can get prompt returns on our obligations. In addition to this, we have a great many past due accounts which we are forced to carry with the dealers as they are carrying their customers for past due accounts and the banks of course are not in any shape to help them out of their difficulty. [204—98] Trusting that you will appreciate the situation and will do everything that you can to help us get quick returns on this insurance money and thanking you in advance for same, we beg to remain,

By the WITNESS.—After that we did not advertise it extensively over the country that this was our property. “The Retail Lumberman” which counsel exhibits isn’t the one I enclosed in that letter to Donlan & Henderson; I am not certain whether I sent two; it is quite possible we did; I won’t deny that I sent that; it is very likely we did. This is a picture in “The Retail Lumberman” which shows my picture and Mr. Henderson and gang. It is preposterous to think that we owned the plant; this is an advertisement we were publishing to help sell this lumber; we hardly meant to impress that we owned the plant. People would probably have bought it as quickly from Donlan & Henderson as from us. We advertised the entire operation, however, as ours.

(Testimony of Thomas S. Dennis.)

Plaintiffs' Exhibit 12, then admitted in evidence without objection, is an advertisement in "The Retail Lumberman," containing at the top three cuts under which respectively appears "A Montana Forest Monarch—Soft Western White Pine that commands admiration," "5/4 x 26 Clear Air-drying our thick wide 'Clears' in the high, dry altitude of Montana," and "6/4 x 24 Clear A Random Selection from Our Stock of 'Clears' at our Pablo, Mont., plant." Below the cuts:

Plaintiffs' Exhibit No. 12.

THE BEST EVIDENCE!

WESTERN WHITE PINE.

Thick, Wide "Clears" at Pablo, Montana.
Complete Stocks of Yard and Factory Material to
Suit Your Requirements.

[205—99]

High, dry altitude, soft textured, well manufactured fine quality stock and first class mill work will Help You to Make Sales and Please Your Customers.

TURNER, DENNIS & LOWRY LUMBER CO.

Member Yellow
Pine Whole-
salers Associa-
tion.

—White Pine Specialists—

Executive, Administrative and
Sales Offices

American
Wholesale
Lumber
Association
Efficient
Distribution

1017 to 1031 New York Life Building

Kansas City, Mo.

(In pencil on margin: June 10th.)

By the WITNESS.—It is not correct that the oral contract I had with Mr. Donlan before it was

(Testimony of Thomas S. Dennis.)

reduced to writing was this: that I told him that there was a little bit of uncertainty about the market, and that if we had a runaway market I was afraid of a trip, and rather than buy I wanted my profit to be certain and that I would take it and buy it and the way I would pay for it was that he must take the risk of the market with me, that I would charge as my profit, to purchasers, 15%, and whether it was a runaway market or a steady market or a reduced market, I would make my payments according to the highest market price that I could get. We took possession of the lumber, then sent our man Juneau here. It is not true that from the 16th day of April, the day of the written contract, until the 3d day of August, we got orders for only three cars. We had innumerable orders for cars at that time; they weren't sent on to Donlan & Henderson because they advised us they were not ready to take on orders; I think I have submitted several letters to that effect. It is not a fact that out of the 11 cars shipped to and including the 3d day of August, 8 were transit cars; there were 10 shipped of which 4 were transit cars. Four of the cars were sent out as rollers and before they landed at [206—100] their destination we expected to sell them. charged a 2% cash discount probably amounting to \$150 or \$200 in the aggregate. We made reports of sale to Donlan & Henderson as soon as the sale was consummated; the period varied depending on how soon the car sold. We sent them invoices as soon as the

(Testimony of Thomas S. Dennis.)

car was sold. I would say that the total amount of the demurrage we charged to Donlan & Henderson was somewhere around \$400. Counsel summing it up on three cars, totaling \$601, and asking where I find anything in the contract that justifies me in charging demurrage to the plaintiffs, I will say that was discussed at the time the suggestion was made that some of the cars to be sold were transit cars; that suggestion was made by myself, and the method of assessing demurrage and penalty charges was explained by me as part of the transit car business; there was no agreement as to that \$601; it was generally understood in the conversation with Donlan & Henderson that any expense of car service incidental to making sale of those cars would be charged to them. I testified that we had such an oral contract—I say, oral discussion at which this feature was discussed. They agreed to leave the marketing of this lumber entirely to our good judgment as they indicated in several of their letters; they indicated to us they agreed to do that under the contract, but we gave them the preference of determining where and when they would sell. As to whether there was any agreement between us that they would stand this charge of demurrage, prior to this instance we discussed it fully, and they assented that we put the lumber in transit, knowing that there was always a charge or a possible contingency. I charged it to them in line with my conversation with them of that; that would be true as to the matter of

(Testimony of Thomas S. Dennis.)

reconsignment; that is a similar charge. That amounts to \$32. [207—101]

The excess freight I did not include in the demurrage. We never received any of those refunds yet because Donlan & Henderson did not send back the expense bills; that can be collected at any time these expense bills are presented to the railroads. Those amount to approximately \$199.99.

The lumber we bought from McKenzie Brothers at Hot Springs was western pine—yellow pine; there is no white pine sawn in this country; it is customary to call the yellow pine grown here western white pine; what we got from McKenzie Brothers was just the same. There was very little larch in it, an occasional tree, and I think no fir at all. As to the character of the cut, it all went into #1 common and also the 5/8ths shop. There were several mills from January to August we were handling cuts, several of these on a commission basis. As to the Beresford stock we got in Idaho, we bought several million feet of miscellaneous wood there—approximately 2,000,000 feet of western pine in that cut, I think. We gave \$27.50 for the white pine; we paid different prices at different places. The white pine in Spokane was the same as Beresford's we bought some larch and fir but paid a lower price; it was practically all segregated and practically all was in pile at that time. I don't know what percentage there was of fir and larch; there was no larch whatever in any I described; that million and a half we bought from

(Testimony of Thomas S. Dennis.)

them was all western pine; we bought probably the same amount of fir and larch at a lower price.

Mr. Donlan paid me the \$60,000 of insurance the latter part of September; at that time the notes we sued on in this case had not already been paid; he did not tell me to apply the \$60,000 on these notes; he told me to apply it on the debit balance due us. He did not tell me to apply it on the notes and I did not tell him I would and that I would deliver him the [208—102] the next day the notes. I told him that I had the notes with me and that I would deliver them to Mr. Henderson when they were paid. I did not tell him at that time that I would deliver the notes to Mr. Henderson when I went up to Pablo. Mr. Henderson asked me for the notes up there that day. I don't know whether he asked me on the ground that Mr. Donlan had told him the notes were paid; he didn't state what the reasons were. This demand of his came up after the bookkeeper and I had gone over the books and I made out this statement for \$36,000 and wanted him to accept; he accepted it rather quickly. I was not very much incensed because the bookkeeper wouldn't accept this statement of mine. I did not, after Mr. Henderson had turned that statement of mine down, Exhibit 1 of the defendant, go to the bookkeeper, Rapp, and say, giving him either the original or the copy, "Here is a record for you; enter this in your books." Nor did I say anything of the kind. It is not true that after Mr. Henderson came back he

(Testimony of Thomas S. Dennis.)

demanded the notes and I reached down in my grip or bag and pulled them out and said, "I will give you these when you pay the rest you owe us"; what I told him was that when the balance due us as established by the statement was paid us, we would relinquish the notes; there was no antagonism at that time; we were on very friendly terms. I didn't take the notes out and shake them at him; I'm not accustomed to doing business that way; I wouldn't be guilty of anything like that. The notes have never been delivered to this day; they are still in our possession.

Mr. Donlan said, with reference to making the application of that \$60,000 at the time he gave it to me, to apply it against the balance they owed us; I don't recall his words. As to speaking of an over-account, or of advances, or of notes, my recollection is that he referred to it only as balance due us. [209—103] Apply it on the balance due, is my recollection. Part of the loans we made to Donlan & Henderson were represented by notes, and part by their bills of sale. The bill of sale did not pay off the obligation instead of securing it; they were simply given as security for the money we loaned on the lumber; that was our understanding, certainly. I don't recollect that we ever wrote Donlan & Henderson to say those bills of sale were security. I am not certain that we ever communicated with them, either orally or in writing after the execution of the contract, Plaintiffs' Exhibit 1, and use the word security with reference

(Testimony of Thomas S. Dennis.)

either to the contract or the bill of sale. We got these bills of sale and Mr. Juneau, our agent, had them recorded at the county seat of Flathead County, where the lumber was located at that time.

As to our allegation in the complaint that Henderson and I agreed upon a balance of \$36,000 due us, for which there is an account stated, the account being represented by our Exhibit 1, Mr. Henderson agreed to that being accurate to this extent, when I handed it to him he took no exception to it other than the exception to the insurance, after which I explained that to him and he withdrew that exception. We made it out jointly, his bookkeeper and I, after comparing and going over the records, and I think the suggestion was made either by Mr. Henderson or myself that it was subject to minor changes, after we had an opportunity to make a complete auditing. There was no agreement with Mr. Henderson in regard to that other than I stated that was our account, as Mr. Rapp and I developed it. There was no formal agreement, his bookkeeper and I had gotten out this statement and I handed it to him; the only reference he at that time made was in regard to some insurance and the fact that he promised to pay the balance when he got the rest [210—104] of the insurance, evidently establishing the fact that he thought that was substantially correct. I don't think he said that this \$36,000 was due us.

Redirect Examination by Mr. POPE.

In computing and making up that statement

(Testimony of Thomas S. Dennis.)

referred to in the exhibit I have just been testifying about, the advances made subsequent to the fire were not considered at all; that is simply a statement of our account, including all transactions, based on the lumber on which we had advances up to the fire.

Recross-examination by Mr. PARSONS.

As to whether I want the Court to understand that we advanced and owned in the neighborhood of a hundred thousand, I will let that question go until I complete the statement.

Witness excused.

Testimony of Albert Richard West, for Defendant.

ALBERT RICHARD WEST, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. TURPIN.

My name is Albert Richard West; I live at Spokane, Washington, and I am in the wholesale lumber business. I go out and buy lumber from the mills through Washington and Montana, and dispose of it. Besides our own firm, I buy for W. M. Crombie, New York City, and E. H. LeMay, Montreal export; we also do a domestic business in the far east. I have been in the business and buying in this Montana market 12 years, and am familiar with the market in this district on Montana and Washington, for the mill runs of lumber. By mill run is meant where you buy a cut of lumber taking

(Testimony of Albert Richard West.)

it as it come from the mill, [211—105] either piled up at the mill or f. o. b. the mill.

I know what was the general range of prices for mill runs during the year 1920; it depends entirely on the timber but all the way from \$22.00 up to \$30.00. I know of two sales or three that were made; Mr. Dennis has already related our sale. We sold them a million and a half on Priest River on a basis of \$30.50, f. o. b. cars; this was dressed. I know of one or two sales in Spokane where the stock was hauled in by auto truck, piled in the yard, on the basis of \$30; that was along in July or August. The price hauled in by auto truck would be higher than it would be at the mill. I hardly believe there would be any substantial difference in the market where this was done and Pablo, and loaded in this neighborhood. The highest price I have known to be paid for cut in July and August and September, 1920, was \$30.50. As to the grades included in that, the #4 was practically all out, and we had a small percentage of the #3 that we had already disposed of then. It left almost a #2 and better grade, with a small percentage of 3.

I bought other lumber in 1920; I made several contracts in a range of 50, 75 and 100 miles from Spokane, one in particular with B. L. Wilson Lumber Company, at Cusick, Washington, about 75 miles from Spokane. This was western pine, partly mixed; we bought about 3,000,000 feet of western pine. We bought that in the yard rough

(Testimony of Albert Richard West.)

on the basis of \$28. That was in March and we had to do the milling of that lumber, which would run around \$4 a thousand; later when the conditions got so badly demoralized the B. L. Wilson Company came to us and voluntarily reduced our contract \$2 a thousand, to \$26. They did that along the latter part of August or the fore part of September. [212—106]

In January and the fore part of February we had what is termed a runaway market, and along the latter part of February or the fore part of March when the Weyerhauser Sales put in their reduced prices and cut 30% it brought business almost to a standstill, and from that time on the market has been growing worse all the time. Unless one was located suitable to a box factory they had business for, there would be practically no market in July, August and September, for 3,000,000 feet of lumber at the mill; box factories had a little business over in our district; it was their apple box season. In January it was a runaway market, strong; that started to drop in February, and kept droppng to the present time; it is badly demoralized. After April and May, 1920, we couldn't market 3,000,000 feet of lumber at the mill very quickly; in the first place there was no demand to speak of and what little demand there was was practically in mixed cars, where the dealer wanted 50, 75 or maybe 100 items. The quotations of lumber didn't mean that you could load and sell any amount of lumber you had at that quotation; they

(Testimony of Albert Richard West.)

would send a quotation for possibly one or two cars, giving you a list of just what they wanted; we couldn't sell any large bulks of stock at that time. That condition existed from along the latter part of March or the fore part of April up to the balance of the year. I don't think in July, August and September 3,000,000 feet of western pine could have been sold unless, as I said, the mill happened to be located near a box factory that had some favorable apple box business; in that event I would say from \$28 to \$30 could be procured for it. You couldn't go out and sell the bulk of this lumber on ordinary sale, if you were not situated near a box factory or an apple orchard or something of that kind, and you had them to dispose of it to. You couldn't sell it at that time; [213—107] it was impossible. We couldn't get any price for it, because we had been trying to sell some right along; there didn't seem to be any demand. I would say the range of the market from August first on down to the end of 1920 was around \$12 to \$15 a thousand, average.

Cross-examination by Mr. PARSONS.

I have known Mr. Dennis about three years. I have bought some lumber for Turner, Dennis & Lowry at times; I am not on the payroll at this time. I am interested in some mills manufacturing lumber. I am interested in the Donovan Hopka Ninneman Company at Hope, Idaho, and have been for about three years; also in the B. L. Wilson Lumber Company at Cusick. The Wilsons cut at Cu-

(Testimony of Albert Richard West.)

sick about 50 or 60 thousand a day; the Donovan, Hopka Ninneman cut at Hope about 25 to 30 thousand. That measured about 10 to 12 million at Cusick operation, and one to two million at the Hope operation. We own no lumber yards ourselves; I am what they call a "scalper"; that is, a broker; that is, I get lumber where I can get it cheapest for some customer.

I say it was impossible to sell this 3,000,000 feet of lumber after July, 1920. I sold a million and a half to these very people in August, but I meant on the market, to go out and get orders for it. I was working all the time to get orders on the market. I stayed around Spokane; we had twelve or fifteen connections out through the territory trying to sell lumber. I was out in March; that was the time of the runaway market.

There were three or four of us interested in parts of the cut on Priest River; there was no litigation involved in the matter; we couldn't get cars; we only had limited planing-mill facilities, and I took it up with Mr. Dennis to see if he wouldn't purchase our interests up there, feeling that it was [214—108] for the best of all concerned. He purchased it; he took the pile, good, bad and all, for \$30.50. As I said, we had shipped practically all of the #4, and the greater part of the #3 out of that, left it almost cut to #2 and better, with a small percentage of 3.

Witness excused.

Testimony of G. H. Lowry, for Defendant.

G. H. LOWRY, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. POPE.

My name is G. H. Lowry; I am president of the defendant company, and have held that office ever since its organization in January, 1920; prior to that time I was in the lumber business since 1898. I came to Montana in connection with the Donlan & Henderson matter in November, 1920. I got here from Polson on Sunday afternoon about four o'clock, on or about the 20th of November; I was in Pablo before I came to Missoula, and saw Mr. Henderson at Pablo. On Saturday Mr. Juneau and I went out to the mill near Pablo and met Mr. Henderson there, and then we went back to Polson and stayed there that night and came down on the train leaving Polson about noon on Sunday, and Mr. Henderson and Mr. Keith, his auditor, got on the same train at Pablo, and we all came down together. When I came to Missoula I did not find Mr. Donlan.

The purpose of my coming here, they had received advice that the balance of the insurance checks would be here on the Monday following the Sunday when we arrived, and I came down for the purpose of endorsing these insurance checks and receiving approximately the \$35,000, due us from Donlan & Henderson out of these insurance checks. On Monday we went over to the [215—109] bank and Mr. Henderson made inquiry and was advised that

(Testimony of G. H. Lowry.)

the remittance had not been received. I think Mr. Donlan got in some time that evening or early night. Tuesday morning, perhaps the middle of the forenoon, I received a telephone call at the hotel from Mr. Henderson to come down to an office which he described, and Mr. Juneau and I went down there; it was in the Western Montana Bank Building, or something of that sort. I found Mr. Donlan, Mr. Henderson, Mr. Keith and Mr. Violette there; that was at Mr. Violette's office. Mr. Henderson started the discussion with reference to our contract in settlement, that they didn't construe this contract as allowing us \$5, a thousand above our advances. I told Mr. Henderson that it seemed strange to me that no exception had been taken until now, to the statement which Mr. Dennis had left with them something like two months before; that perhaps I had better go back home and send Mr. Dennis out to make the settlement; and then I explained to them there that we had loaned them approximately \$100,000, or 40% of our capital, which they had the use of the greater part of the year, and it seemed only reasonable in case we were defeated in getting our commission for handling the lumber that we should have some compensation for making a hole like that in our year's business, and we thought that was perfectly reasonable. The reply to that was that they had paid us interest; I told them if we wanted to loan money we could stay at home and do that; that the purpose of making our loans to mills was to promote our lumber business and make a profit

(Testimony of G. H. Lowry.)

on the lumber because we were borrowers of the banks ourselves and paying interest and we were not ahead anything on the interest, and also we had quite a considerable expense in maintaining men to go around the mills and check up the lumber. We got nowhere in that discussion. We made no agreement on arbitration. [216—110] Mr. Keith said Dennis' statement which he had given to Mr. Henderson a couple of months before at Pablo had not made proper allowance for stoppage of interest on account of the ten or twelve cars which had been shipped out; in Mr. Dennis' statement of that he had computed interest on the total amount loaned them up to the period when he was there and they had credits against the interest and allowance of \$83, as I remember, for the stoppage of interest, dating back to the dates of the shipments of these cars; of course, they were entitled to stop payment of interest as soon as they made shipments out under the contract. I had proposed that we would take our money back if they wanted to pay us; that we wouldn't and didn't want an operation that did not provide in the contract that provision in clause 8 for protection to us in case of fire; that, of course, we would not renew the contract the first of January for another year; under no circumstances would we enter into a contract without that provision, which they said they would not allow; that under the circumstances the sale of any of the lumber accumulating after the first and up to the first of the year should not be given to us, as un-

(Testimony of G. H. Lowry.)

doubtedly they would prefer to have a single operation with someone else for 1921, including what lumber they had on hand, rather than have us handle a million or two million feet at \$20 a thousand and then have someone else handle the balance. Mr. Donlan had said he would consider that. We then adjourned to meet that afternoon, for Mr. Donlan to consider my proposition, and pay us up and we would withdraw from the operation and release the lumber, and also Mr. Keith to compute this interest allowance to them.

We did not meet at two o'clock again. In the meantime, Mr. Henderson called me up at the hotel and told me that Mr. [217—111] Keith would be unable to have his figures by the time set, and I don't know whether he set another time then or said he would call up later. Mr. Donlan did not appear at that time. I found later that he had gone somewhere else. Later in the day Mr. Henderson called up to say that Mr. Keith hadn't got his figures completed, and finally Mr. Henderson and Mr. Keith and an attorney—I believe Mr. Violette, came to my room at the hotel about eight o'clock in the evening; it was then that I learned that Mr. Donlan had gone out to his logging operations. When they came up to the room, Mr. Henderson brought the statement which Mr. Keith had been working on, and which proved to be a statement of account rather than a computation of this presumed error in the interest. That statement was Defendant's Exhibit "E," handed me by Mr. Hen-

(Testimony of G. H. Lowry.)

derson. He told me that Mr. Donlan had gone out to his logging operations and I took exception to his having gone away when we had an appointment with him, and he said that Mr. Donlan had understood that I was going to go back home and send Mr. Dennis out to make this statement.

I raised the question that he had not figured any interest at all; there wasn't interest charged to them of some \$2,300 or \$2,400, which he had not shown as credited on this, and we discussed the question of \$14,000 charged to us against the advance which was due them on their September cut. That was satisfactory; that was the last item on the list, 699,972 feet, November finished piles, \$13,999.-44; that was the amount of the November allowance on the cut made during October or up to the date of the inventory that was taken. The other advances made in September were not included in this statement. Charging that \$13,999 against us, the statement shows a balance due us of a little over \$1,000. I furnished them a statement later making some corrections of their figures on this, both in the proceeds [218—112] which they attempted to estimate of the cars shipped, and also of the interest which they failed to include at all. Defendant's Exhibit 13 is a carbon copy of a letter which I dictated in Spokane, and sent the original by Mr. Juneau to Mr. Henderson, at Pablo. Accompanying that I sent the statement which I have just referred to, correcting the statement of Mr. Keith as to the interest.

(Testimony of G. H. Lowry.)

The hour of twelve o'clock, noon, having arrived, court was in recess until 1:30 P. M., at which time the trial was resumed, the witness G. H. Lowry resuming the stand.

By the WITNESS.—Defendant's Exhibits 14 and 15 are the letter and the statement so transmitted by me to Donlan & Henderson. That's the original letter with my signature; that is a carbon copy of the statement rendered, and both of these were given by me to Mr. Juneau in Spokane, with instructions to deliver them to Mr. Henderson at the mill. This was not in the nature of a compromise offer of the difficulties existing between us.

Defendant's Exhibit 14, then admitted in evidence, is a letter from the defendant company, signed by "G. H. Lowry, Pr.," to Donlan & Henderson, dated at Spokane, Wash., December 7, 1920, reading as follows:

Defendant's Exhibit No. 14.

Gentlemen:

I have waited here for further advice from you in accordance with Mr. Donlan's wires, reading, November 27, "In conference with parties. Will wire later tonight or in the morning," and November 28, "Parties are to let me know definitely Thursday."

I wired Mr. Donlan Friday night, December 3d, after trying [219—113] to reach him by 'phone.

I have just talked with Mr. Donlan by 'phone and he advises his parties put him off from Thursday to

Saturday, and from Saturday to Monday, but had not heard from them up to noon today.

Mr. Donlan desired that Mr. Juneau proceed to make usual December estimate, and he will leave here to-night for the purpose.

Herewith please find statement, subject to correction if any error has occurred, showing balance due us on your notes of \$4,416.60 to be deducted from amount due you on December advance.

The \$7,055.18 is the amount wired me from the office as proceeds due you on all cars which have been closed. Detailed account of each car is being sent you from Kansas City. There will remain due you, balance above \$20.00 per M ft. on cars 78564 and 56461 and these balances with usual detailed statement of sale will go forward to you as each car is closed.

I understand we have at Kansas City Insurance policies for only \$20,000.00 against advances. Please give to Mr. Juneau additional policies to cover the 1,615,786 ft. covered by previous advances plus whatever the December advance covers.

On basis of this statement, when the \$4,416.60 balance due on notes is taken into account on the December advance, all of your notes will stand paid and will be sent from Kansas City to you at once. Also the November 4th advance having been paid to you by credit on your notes, the draft which Mr. Juneau gave you for \$13,999.44 stands cancelled. Please therefore give it to Mr. Juneau.

I have taken Mr. Dennis' figures of October 4th for credit of \$83.22 interest refund to *you* account shipments. Mr. Keith said we had not given proper allowance on interest, but did not make any mention or correction of it on his statement. However, this is simply computation, and correct figures will of [220—114] course be used. Any error of any description in enclosed statement will be corrected.

We are endeavoring to get an order for the

* * *

Defendant's Exhibit 15, then admitted in evidence, is as follows:

Defendant's Exhibit No. 15.

DONLAN AND HENDERSON ACCOUNT

Any errors or omissions will be corrected:

1920	Debit
4/15 Notes (\$40000) (\$10000) (\$10000)	\$60,000.00
6/28 Notes (\$6082.24) (\$5000.00)	11,082.24
6/28 Advance	8,917.76
8/14 Advance	4,466.36
10/4 Int. \$60,000 4/15 to 10/4 @ 7% 5 M. 19 days.....	1,971.65
10/4 Int. 11,082.24 6/28 to 10/4 @ 8% 3 M. 6 days.....	236.41
10/4 Int. 8,917.76 6/28 to 10/4 @ 7% 3 M. 6 days.....	166.46
10/4 Int. 4,466.36 8/3 to 10/4 @ 7% 2 M.....	52.10
	<hr/> 86,892.98
10/4 Cr. per Attached statement.....	68,618.40
	<hr/> 18,274.58
10/4 Due T. D. & L.....	18,274.58
11/4 Int. 10/4 to 11/4 (11082.00 @ 8%.....	9.23
(Bal. @ 7%.....	106.60
	<hr/> 18,390.41
11/4 Less advance of 11/4 on lumber.....	13,999.44
	<hr/> 4,390.97
12/4 Int. one month 7%.....	25.63
	<hr/> 4,416.60
12/4 Due T. D. & L. Lbr. Co.....	4,416.60

(Testimony of G. H. Lowry.)

Advances

Sept. 2	10289.98
Sept. 30	8026.30
Nov. 4	13999.44
	<hr/>
	32315.72
	<hr/>
	4416.60

\$36732.32 Total

Credit

10/4	Draft	60,000.00
10/4	Refund interest on shipments:	
	1509.98 7/ 1 to 10/1 26.42	
	2519.76 7/10 to 10/1 39.20	
	1651.12 8/ 1 to 10/1 17.60	
	<hr/>	
		83.22
10/4	Proceeds of shipments:	
	Car 78564 shipped not sold about 40000 ft.	
	@ 20.00 adv.....	800.00
	Car 56461 shipped and sold. Final settlement and	
	frt. bill not received. About 34,000 ft. @ 20.00	
	adv.....	680.00
	Balances on above due and payable to D. & H. as	
	soon as net proceeds can be ascertained.	
	Total net proceeds all other cars shipped.....	7,055.18
		<hr/>
		68,618.40

[221—115]

By the WITNESS.—Following the time when the statement of Mr. Keith was handed to me at the hotel, I saw Mr. Donlan while I was in Missoula; if that conference was on Tuesday I saw him the following day, Wednesday; I met him at Mr. Violette's office. At that time we talked about the suggestion previously made by me that Mr. Donlan pay us what we had advanced and let us retire. I made a proposal to Mr. Donlan which you might call a compromise offer or not to settle the difficulty, that if he would pay us back what they owed us we would release the lumber and retire from this prop-

(Testimony of G. H. Lowry.)

osition; that was never consummated. In regard to that proposition, Mr. Donlan says, as near as I can remember his exact words, "I have wired for money and think I will get it, and I will know by Saturday," and I replied to that that I would go on to Spokane to-night, that I disliked very much to be compelled to come back to Missoula on my return, and he says, "It will not be necessary for you to come back; I will send Mr. Henderson to settle with you, and you will have a telegram from me by four o'clock Saturday." I received such a telegram, delivered by the telegraph company to the hotel and by them to me. Defendant's Exhibit 16 is that telegram.

Defendant's Exhibit 16, then admitted in evidence without objection, is a postal telegram from E. Donlan to G. H. Lowery, Davenport Hotel, Spokane, dated Missoula, Nov. 27, reading: In conference with parties, will wire later to-night or in the morning.

By the WITNESS.—A wire was sent as promised in the preceding telegram, and Defendant's Exhibit 17 is the one that I received. [222—116]

Defendant's Exhibit 17, then admitted in evidence without objection, is a Postal telegram, dated at Missoula, Mont., 28, 1920, from E. Donlan to G. H. Laury, Davenport Hotel, Spokane, Wash., as follows: Parties are to let me know definitely Thursday.

By the WITNESS.—The final outcome of Mr. Donlan's promise to let me know was a telephone conversation with Mr. Donlan about a week later.

(Testimony of G. H. Lowry.)

He had not secured the money he talked about up to the last communication I had with him. I went on west and around to Kansas City, before which I sent through Mr. Juneau the statement I have previously referred to.

There was another inventory made after November of the lumber that was in pile at the mill; that was completed from the 8th to the 10th of December; no advance was made on that account. I had a conversation by telephone with Mr. Henderson about that subject. With respect to how that advance would be made and under what circumstances, in the first, they said, from the amount of the advance would be deducted about \$4,400, balance on uncontroverted matters as per the statement which I had sent them, on consideration, if they received this advance from us, our proposal to accept this referred to our loans to them, and release, the lumber could be withdrawn, and we would not make this December advance and then take our money back, but if they wanted to pay us off and have the lumber released, it must be done on the basis of what they had already obtained then and not any more. I stated in the letter if they elected to make the draft then, our proposal to withdraw would be cancelled; we would not make that good; they never drew on us for the amount of the December advance or any portion thereof. [223—117] Mr. Henderson told me they would defer that matter until Mr. Donlan's negotiations were completed. There was never any request or demand made on us for the advance on

(Testimony of G. H. Lowry.)

the December inventory. The next information I had from them was a telegram from Mr. Parsons that a suit had been filed against us.

I am familiar with certain features of the manufacture and cutting and planing of lumber of the character of this at Donlan & Henderson's plant; I am acquainted with the business of manufacturing lumber; I have had knowledge of that business beginning about 22 or 23 years ago. Lumber graded in the yard as it comes from the mill will grade lower as it comes from the planer for a variety of reasons. In drying lumber, this western pine especially, and some other varieties of lumber, there is more or less stain develops; there is a certain amount of seasoning checking that develops unavoidably; there are some split ends that develop and a certain amount of warping, the boards will curl up and roll down when they go through the planer, and holes come, by the pressure, and that all lowers the grade; in grading lumber there are certain machine defects that are recognized by the grading rules—chipping, it is called, and curls and breaking up of knots and knocking out a piece of a knot. All of those are unavoidable in the process of drying and seasoning lumber.

Cross-examination by Mr. PARSONS.

I never heard of an instance of lumber being graded so that it overruns when put through the mill; it depends on how they grade it. My contention is that on December 8th or at the present time, according to our books and claim, the plaintiffs in

(Testimony of G. H. Lowry.)

this case owe us \$36,732.32, outside of about \$16,000 uncontraverted matter. This statement is approximately correct, [224—118] as far as it went; it didn't take into consideration the matter of \$5 a thousand which Donlan & Henderson refused to recognize, and also these cars that were credited here, I have stated in the letter were subject to revision, as I had simply received a telegraphic advice from the office that this was not to be absolutely right. I have no knowledge at all of the items of \$601 for demurrage and \$199 for excess freight; and I know nothing at all of the deviation of cars, \$5. Our total claim amounts to \$36,732, plus \$16,000 for this \$5 a thousand profit on the lumber, making a total of substantially \$53,000. I assumed that Donlan & Henderson owned this lumber at the mill at the time it was destroyed, in making these figures. 3,338,000 feet of lumber, even at \$25 a thousand, would amount to substantially \$83,450. If it was worth \$50, as a matter of computation, it would be worth way over \$160,000.

As to whether I stated that I thought this account which was delivered to Mr. Rapp or Mr. Henderson about October 1st, 1920, ought to be accepted as true because we had received no repudiation from Mr. Henderson, I will say I told Mr. Henderson, and Mr. Donlan was present, that it seemed strange to me that there was no complaint or objection to this matter until practically 60 days—it was about 60 days. Defendant's Exhibit "E" is the account that was rendered me by Mr. Keith on the 23d day

(Testimony of G. H. Lowry.)

of November, 1920. As to whether I, in writing or otherwise, repudiated this to Mr. Donlan or Mr. Henderson, or either of them, I will say I sent Mr. Henderson my other statement. I called their attention at the meeting in the evening to the fact that these amounts on these cars were wholly immaterial, as the account of sales which we rendered for these cars would show the exact proceeds of the cars. Asked in what regard I repudiated Exhibit "E," I will say I called their attention [225--119] to the fact that they had not computed any interest on it and I raised a question about an item of \$177.80, discount on the drafts. I don't remember any discussion of their statement in here that these notes were paid and their asking us to return them. I don't think counsel's question that because I had not repudiated that for a period of seven months I wish the Court to understand that I accept that as true, should be answered; this suit was filed a short time after that. Asked if I ever repudiated it, I will say I furnished them another statement there. I furnished them, a corrected statement to show that I didn't accept that as true. I don't remember any specific discussion as to whether these notes were not paid or of our never refusing, apparently, to deliver them.

Witness excused.

Testimony of Louis X. Juneau, for Defendant.

LOUIS X. JUNEAU, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. TURPIN.

My name is Louis X. Juneau; I live in Spokane; my occupation is lumbering; I am employed by Turner, Dennis & Lowry Lumber Company, and have been so employed for a year and a half. I was acting under the company's instructions, Mr. Dennis in particular. During that time I have been looking over contracts for them, and also any proposed contract submitted to them for consideration. What I mean is to check their tally and inventory the lumber, and watch the grades and manufacturing and shipping; I did that in regard to this lumber at Pablo.

I had conversations with Donlan or Henderson or both of them as to shipment of that lumber, as to when that should be made. Along the first of May I asked if they were ready to [226—120] ship, and Mr. Henderson said, no; he says, "We don't want to start that old slow feed machine; it is too expensive to operate it under the present cost of wages." He said they wanted to wait until they get the fast-feeding machine in. I didn't have a further talk with him until the next trip out there, possibly in June. Then I asked him if they were going to start with any more shipping, and if I remember right I left a loading memorandum list there with them, so that any time they wanted to

(Testimony of Louis X. Juneau.)

start they could load off this memorandum list. They said if they decided to start shipping they would do that. By the machine, I mean the matcher or planer, the one that dressed the lumber. The lumber was rough in the piles and was to be shipped dressed; they didn't want to dress it and load it with this slow machine. I don't know as I had any more conversation after that until along the last of July; they commenced shipping some time in July, if I remember right. They did not have a new machine then, but started up the old machine. I don't know exactly the number of men they had employed there, probably 18 or 20.

I made a tally of the lumber somewhere about the first of each month. I made one in June, July, August, September and so on to the last trip. I have those tally books for June, July and August for all the stock that I have inventoried in the yard, as per grades and pile number and so forth. I have a tally book for June 28th. To get the notations on this Exhibit, Defendant's Exhibit 18, I went through the yard with their representative, Mr. Rapp, and took it off from their piles, as they were marked, numbered, in front of the pile. The grade was indicated on the front of the pile and I wrote it down. This only represents the figures that I found on the piles; they were checked together. [227—121]

I made the next tally in August, but haven't the record here; I think I left that at home; I have looked for that at home, and have not been able to

(Testimony of Louis X. Juneau.)

find the complete tally of that record; all I have is the total amount of the August 3d inventory; it shows just the totals of each kind. I made all the search that I could imagine for the complete tally of August 3d. I didn't make one in July; August 3d is the July, just a continuation of that. The two of them averaged as to grades and quantity about the same. I have figured from these sheets the percentage of the different grades that were in it, and am able to say what the percentage is, as shown by this Defendant's Exhibit 18. They would be 20% 1 and 2, 30% 3, 15% D select and better, 10% shop, 10% #4, 15% dimension.

By Mr. TURPIN.—We offer this Exhibit 18.

By Mr. PARSONS.—I would like to ask a question or two.

By the WITNESS (In response to Mr. PARSONS.)—This instrument that I have here, pages running from 135 to 146, seems to have been torn out of a book; that was another book out of which I used for another purpose; that is the back end of the pages; it was an old book I was using up, and all the rest of the leaves of that book I can bring here; they came loose as they are. I did not make my monthly statement in this loose-leaf way; that was only that one particular old book. The rest of the estimates I commenced using a new book. I have that book. This was made with Mr. Rapp, their representative. We compared all the way through, as we were going through the yard and each kept our own books and our totals agreed.

Defendant's Exhibit 18, then admitted in evidence without objection, as as follows:

Defendant's Exhibit No. 18.

Fletcher Spur., Pablo, Mont., 6/6/20.

DONLAN & HENDERSON INVENTORY JUNE 6, 1920. [228—122]

Pile	No.		
1	11316	1 x 12—16 #3 6/6	220.56
2	1120	1 x 12—16 #2 5/26	179.20
3	1769	1 x 8—16 #2 6/6	188.69
4		4" to 12—16 #4 5/25	150.40
5		1 x 4—10/16 Set 6/3	118.62
5		Roof Bd	2.68
6	13	2 x 4—16 casing	1.39
6		1 x 4 10/16 Set 6/6	149.10
6		Roof Bds	3.88
6	9	2 x 4—16 . . . . .	.96
7		1 x 6—10/6 Set 6/6	143.45
7	10	2 x 4—16	1.07
7		Roof Bd3	3.92
8		1 x 8 10/16 Set 6/3	126.36
8		Roof Bd	3.42
8	12	2 x 4—16	1.28
8	352	1 x 4—16 cain	18.77
9		4/4 Shop 6/3 6/3	88.48
9		Roof Brd	3.48
9	232	2 x 4—16 x	24.68
			1430.39
143039 @ \$20			\$ 2860.76

INVENTORY JUNE 25—20.

Pile			
10	1318	1 x 12—16 #3 6/18	210.88
11	1318	1 x 12—16 #2 6/16	210.88
12	705	1 x 12—16 #2	112.80
13	933	1 x 12—16 #3	149.28
14	721	1 x 10—16 #3	95.80
15	1482	1 x 10—16 #3 6/15	197.34
16	1483	1 x 10—16 #2 6/12	197.47

17	587	1 x 10—16	.....	78.27
18	761	1 x 8—16 #3	.....	81.16
19	1898	1 x 8—16 #3 6/21	.....	202.45
20	1205	1 x 8—16 #2	.....	128.53
21	1735	1 x 8—16 #3 6/8	.....	185.07
22	714	1 x 12—14 #3	.....	99.96
23	511	1 x 12—14 #2	.....	71.55
24	663	1 x 10—14 #3	.....	77.35
25	482	1 x 10—14 #2	.....	56.23
26	1383	1 x 8—14 #3	.....	124.11
27	849	1 x 8—14 #2	.....	79.24
28	474	1 x 12—12 #3	.....	56.88
29	384	1 x 12—12 #2	.....	45.08
30	514	1 x 10—12 #3	.....	51.90

2516.83

Pablo, Mont.

DONLAN & HENDERSON INVENTORY JUNE 25—20.

31	410	1 x 10—12 #2	.....	41.00
32	989	1 x 8—12 #3	.....	79.32
33	900	1 x 8—12 #2	.....	72.00
34	80	1 x 12—10 #3	.....	8.00
35	80	1 x 12—10 #2	.....	8.00
36	117	1 x 10—10 #3	.....	9.75
37	79	1 x 10—10 #2	.....	6.58
38	376	1 x 8—10 #3	.....	24.48
39	226	1 x 8—10 #2	.....	13.40
40	28	1 x 12— 8 #3	.....	2.24
41	22	1 x 12— 8 #2	.....	1.76
42	50	1 x 10— 8 #3	.....	3.44

[229—123]

43	39	1 x 10—8 #2	.....	2.60
44	203	1 x 8—8 #3	.....	10.73
45	83	1 x 8—8 #2	.....	4.43
46		4/4 Shop	.....	95.70
47		4/4 Shop 6/23	.....	121.70
"	21	1 x 12—18 Roof	.....	3.78
"	14	2 x 4—16	.....	1.49
48		#4—16 ft. 230	.....	82.80
49		#4—16 " 6/17	.....	184.00
50		#5—8/20 200	.....	68.90

845.20

290 *Edward Donlan and Ben W. Henderson vs.*

51	4" to 12— 8	53	.....	23.85
52	" —10	94	.....	45.12
53	" —12	114	6/16	82.08
54	" —12		.....	10.26
55	" —14	164	6/16	123.00
56	4" to 6— 8	cons 52	6/23.....	36.92
57	" 12—4/6	30	6/8	24.60
58	" "	30	6/17.....	25.20
59	" "	30	.....	19.50
60	#4" Bds. 16—	230	6/8.....	184.00
61	#4 " —16	160	.....	19.20
62	195 1 x 4—10	#2	.....	6.40
63	566 1 x 4—10	#3	.....	18.87
64	314 1 x 6—10	#2	.....	15.70
65	539 1 x 6—10	#3	.....	26.95
66	254 1 x 4—12	#2	.....	10.16
67	766 1 x 4—12	#3	.....	30.64
68	839 1 x 6—12	#2	.....	50.64
69	997 1 x 6—12	#3	.....	59.82
70	224 1 x 4—14	#2	.....	10.52
71	534 1 x 4—14	#3	.....	24.92
72	593 1 x 6—14	#2	.....	27.67
				<hr/>
				875.02

Pablo, Mont., 6/25-20.

DONLAN—HENDERSON.

Pile				
73	930	1 x 6—14	#3	65.10
74	131	1 x 4—16	#2	6.99
75	650	1 x 4—16	#3	34.67
76	1094	1 x 6—16	#2	87.52
77	1856	1 x 6—16	#3	148.48
78		5/4—10/6	Shop 221	81.77
79		5/4 "	.....	28.73
80		2 x 4 to 2 x 12	8/16 set 272.....	70.72
81		4/4	Shop 6/8	130.35
"		Roof	.....	3.98
82	429	2 x 12—16	cons	137.28
83	356	2 x 10—16	.....	94.94
84	914	2 x 8—16	6/22	194.99
85	720	2 x 6—16	.....	115.20

Turner, Dennis & Lowry Lumber Co. 291

86	95	2 x 12—14	.....	26.60
87	113	2 x 10—14	.....	26.33
88	290	2 x 8—14	.....	54.13
89	175	2 x 6—14	.....	24.50
90	79	2 x 12—12	.....	18.98
91	94	2 x 10—12	.....	18.80
92	192	2 x 8—12	.....	30.72
93	169	2 x 6—12	.....	20.28

1421.35

[230—124]

94	24	2 x 12—10	cons.....	4.80
95		2 x 6—2 x 8	80 818	8.98
96		1 x 4—8/20	Set 6/10	88.38
"		Roof	.....	3.15
97		1 x 4—8/20	Set 6/14	108.12
"		Roof	.....	3.96
98		1 x 6—8/14	Set 6/17	110.27
"		Roof	.....	2.31
99		4/4 Shg	6/6	132.00
"		Roof	.....	4.00
100		4/4 Shg.	.....	125.40
"		Roof	.....	4.00
101		1 x 4—8/20	Set	88.40
102		1 x 10—8/16	Set	16.50
103		1 x 8	Set	40.32
104		1 x 6	Set	50.40
105		1 x 8	Set 6/16	102.40
"		Roof	.....	3.80
106		1 x 6—16/20	Set 6/17	161.36
"		Roof	.....	3.80
107		4" to 12"	4/8 Set 43 6/21	31.66
108		4" to 12"	4/8 Set	9.03

1103.02

Pablo, Mont.

DONLAN & HENDERSON INVENTORY JUNE 25—20.

Pile

109	144	2 x 4—12	cons.....	11.52
110	367	2 x 4—14	"	31.25
111	278	2 x 4—16	"	46.33
112		2 x 4—18/20	18—1368	16.21
			20— 253	

(Testimony of Louis X. Juneau.)

113	2 x 6—2 x 8	18/20	18½pc.....	52.99
114	2 x 10—2 x 12	18/20	18½.....	49.95
115	1 x 4 to 1 x 12"	18/20	cons.....	180.05
116	170 2 x 8—16	cons.....		36.25
117	4" to 10"	6/8 Set	6.10 43.....	30.10
118	1 x 10—10/18	Set	6/17.....	127.05
"	Roof			3.78
119	1 x 12—10/16	Set		81.12
120	1 x 13 and wider	sil	143.....	58.63
				<hr/>
				725.25
Covered Piles 6/25—20				466669.....
Uncovered " "				425107.....
				<hr/>
				891776.....
6092.20	Due	Sept. 1st.....		
5000.00	Due	Oct. 1st.....		
				\$ 8917.76
				6082.24
				<hr/>
				\$15000.00

By the WITNESS.—I remember the circumstances of this last draft for \$13,999, plus that was given to Donlan & Henderson. After I inventoried the yard I drew a draft on the company in the [231—125] amount, and then the \$10 credit on the \$20 advancement, and we were to get a bill of sale for the advancement made on the inventory. I drew the draft and wired the company as to what I had done; I gave the draft to them. After that I got a wire from Mr. Dennis in Kansas City that they had not sent the \$20,000 they agreed to send, and for me to get in touch with Donlan & Henderson at once, which I did. I went and saw Mr. Henderson first, at his mill, and I told him the circumstances; then I asked him why their money hadn't been sent, and by not getting that the drafts might be turned down,

(Testimony of Louis X. Juneau.)

and he said, "Well, I thought I needed the money worse than your people did." And we told him that by not having that money there the drafts might be turned down, and if he would give us authority to wire the office authority to draw on them for the \$20,000. He told me to go and see Mr. Donlan; I drove out in my car that same day and located him out from Arlee, and put the same question up to him. He said, "Well, Ben used that," and I said, "The drafts will be turned down if you don't get it," and I think I showed him the telegram from the office, and he said, "I will meet you to-morrow down at Missoula, and see if I can't arrange it for you to get that money." The next day we did meet in Missoula, and without much progress; that evening he told me to go out and see Jack Keith at the bank, the next morning. That was the last conversation we had.

Defendant's Exhibit 20 is a telegram which I received from Mr. Dennis; as is also Defendant's Exhibit 19. I showed these telegrams to Mr. Donlan.

Defendant's Exhibit 19, then admitted in evidence without objection, is a Western Union telegram, dated Kansas City, Mo., June 26, 1920, addressed to L. X. Juneau, Florence Hotel, Missoula, Mont., reading: [232—126]

Defendant's Exhibit No. 19.

Have not replied sooner to your wire twenty fifth as uncertain what course to persue would suggest that you advance to them and draw on us for ten dollars per thousand on the total amount of their

inventories taking bill of sale for same and stenciling the piles and marking the tops course of all unfinished piles we will credit their note due July fifteenth with the remaining ten dollars per thousand if they need more than this you may draw on us up to a total of twenty thousand dollars make this in two notes one to cover the difference between the amount of the advance and fifteen thousand dollars this would amount to approximately six thousand dollars make this one due September first try to satisfy them with this amount but if absolutely necessary you may make another note for five thousand dollars due October first both of these must draw eight percent of necessary to make either or both of these advances have a supplement drawn to our contract to provide that all money payable to them on shipments or new cut as provided for in the contract are to be applied to the payments of these notes except the sums to be deducted in satisfying previous obligations as provided for in the original contract wire fully what you have done and your plans for next week.

TURNER, DENNIS AND LOWRY LBR. CO.

Defendant's Exhibit 20, then admitted in evidence without objection, is a Western Union telegram, dated Kansas City, Mo., June 22, 1920, addressed to L. X. Juneau, care National Hotel, Kalispell, Montana, reading:

Defendant's Exhibit No. 20.

Met Donlan in Chicago last week he asked me for an advance of twenty thousand dollars will you

(Testimony of Louis X. Juneau.)

please go to Pablo and take complete inventory of all stock not covered by recent advances and wire us the total amount including both finished and unfinished piles would suggest that you mark the top course of each [233—127] tile and you tally it as will quite likely make them an advance on all lumber sawn regardless of weather in finished or unfinished tiles after completing inventory go to Missoula and we will wire you further instructions there then wiring give us as much information as possible reference the Pablo operation

TURNER DENNIS LOWRY.

By the WITNESS.—When I showed them to Mr. Donlan they made the notes out. I showed him what the wire had said, and to make the settlement to correspond to the contract, of the payments, and he had that drawn up by Mr. Violette, I think, as supplemental. When I showed him that telegram he said, “I will have to have the full amount of the money.” He had that agreement drawn up and I signed it afterwards. I don’t remember whether we were together when he had it drawn up or not. I think he told me he went to Mr. Violette’s office, if I remember right; I think we signed it up either in Mr. Violette’s office or the bank after I got the note—I don’t recall which place now. We made the notes in the bank; Mr. Keith wrote them out. I don’t recall whether I signed this three at that time or somewhere else, referring to Defendant’s

(Testimony of Louis X. Juneau.)

Exhibit "P," about which I have been testifying.

I was at Pablo the day of the fire and also after the fire. Mr. Henderson asked for information about card prices. I told him I had and gave him the prevailing card at that time. We also discussed what the prices was at that time, what the card showed.

Cross-examination by Mr. PARSONS.

What I had was a basic list gotten out by the Western Manufacturers Association. I took that with the latest discount [234—128] card and then read off the prices of this lumber. Mr. Rapp, representing the plaintiffs, and I, representing the defendant, did not agree on the prices if the lumber as over \$51 a thousand, on the average. I had nothing to do with the proof of loss, never saw it; I did not fix the prices of any. I read the prices off but had nothing to do with the proof of loss prices. If that afterward became the basis of the proof of loss or is the basis of the claim here, the bill of particulars of the plaintiffs, I don't know that.

I state that up to July they had their old machinery; it was old and antiquated and too slow. I am not familiar with the amount they shipped; it was about 11 cars up to August 3d. I think they had a million feet at all times that was ready planed and ready for shipment. They couldn't ship; they didn't want to run the machine.

(Testimony of Louis X. Juneau.)

As far as my conversations with either Donlan or Henderson are concerned, they always assured me that we were named in the insurance policies; that we were protected up to \$25. They never disputed that we were entitled to the insurance we claimed or more. I don't know whether, at the time of the fire, there wasn't more than five or six hundred thousand feet of lumber, not turned over to us by bill of sale, not stenciled in the name of the defendant, and whether there were not tramways and piles and bottoms that belonged to the plaintiffs in the case which was covered by this same insurance. I don't know the figures as to what there was, covered by these two policies of insurance, that belonged to the plaintiffs in addition to the 3,338,000 feet that had been turned over to me. The only reason they gave me for not turning over the \$20,000 when it was first received by them, Henderson said they needed the money worse than my people. That was all that was said about it. [235—129]

This contract that was drawn up later was entirely satisfactory to me. I sent my principals a copy of it.

Redirect Examination by Mr. TURPIN.

Prior to this June 22d or 26th, when I got this telegram, my practice has been to make the advance on finished piles. Under these instructions in the telegram I changed that plan. I inventoried the unfinished piles, those that were not completed.

(Testimony of Louis X. Juneau.)

The last inventory was made on August 3d; the fire on August 3d took the inventory continued and finished up on the morning of the 3d, and the fire was about noon. I had gone through the yard on this inventory and taken the unfinished piles. I couldn't say how much lumber was planed and ready to ship on April 16th. I understood Mr. Parsons' 2,000,000 feet to be undressed; there wasn't any such amount dressed.

Redirect Examination by Mr. PARSONS.

I think I accepted and had delivered to me by the plaintiffs in this case, on the 2d of August, or on the morning of the 3d of August, 1920, just the finished piles.

Witness excused.

Testimony of Charles Carter, for Defendant.

CHARLES CARTER, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. POPE.

My name is Charles Carter; I live in Spokane; I now am and for 25 years have been in the whole-sale lumber business. During the year 1920 I have been engaged in that business in Montana, for the Bradford-Kennedy Company. In the spring and summer of 1920, I had experience myself in the purchase of bulk lots of [236—130] lumber, and I was familiar with the stock of lumber which Don-

(Testimony of Charles Carter.)

lan & Henderson had at Pablo. Sales in bulk of a quantity of mill run lumber such as Donlan & Henderson had there were made to my knowledge during the year 1920; I helped make some of those myself. I know what was the market value, sold in bulk, of a stock of lumber such as they had at Pablo, in the spring or summer or at the time of the fire at their plant, in the summer of 1920, on August 3d; it was about \$30 per thousand feet. In saying that I have in mind that the lumber was dressed and f. o. b. cars. What makes the difference in the market price of lumber is that when it is finished you know what you are getting, and when it is in the pile you don't know what you are getting because you can't determine what the ultimate grade will be. Entering into the uncertainty as to the value is this element: If you are buying it at a stipulated price there would be the feature of a falling market or changed conditions or something of that kind.

I should say it would take three or four months, at least, under the conditions such as existed at Pablo, to put 3,000,000 feet of lumber through the planer and on board cars. During that time the market conditions would be likely to change one way or the other, and the likelihood of a change would affect the market value of a bulk purchase. I was familiar with that yard and stock; I estimate

(Testimony of Charles Carter.)

it would cost at least \$3.50 a thousand to plane and load on board cars such a stock.

The bulk purchases of mill run lumber upon which I base my opinion of market value were made more particularly in the spring. The market run better in the spring than it would have been August. After the increased freight rate on the 26th of August the market went down materially. I couldn't say as to what date the announcement of increased freight rates was [237—131] made, but I think it was made prior to the 3d of August that it was to go into effect on the 26th. If you had put bulk sales of lumber on the market at that time it was quite attractive, and by that I mean loading and getting them out before the freight rates advanced. After the announcement was made and in case the seller wouldn't guarantee shipment before the rates advanced, there wouldn't be any market for bulk sale of lumber in the month of August, 1920; there wasn't any market after the advance was made and the condition of the market has been about the same ever since; that is to say, there is no market for certain items. In August, 1920, it was generally very hard to get car equipment; I would say 10% of equipment was available for the various mills with which I was familiar—only 10% of the desired equipment could be procured at that time.

(Testimony of Charles Carter.)

I have had experience in observing the grades of lumber produced from a stock of timber such as Donlan & Henderson were cutting there, and I think I could state what grades could be produced from such stock. According to my estimation that would cut practically 15% of selects—that is, D and better, and 20% #2; about 50% of 3, 15% of 4; that is, taking in the whole logging consideration. As to whether it would be possible to cut there from that stock of timber 18½% of D and better selects, 26% 1 and 2 common, 20% 3 common, 10% 4 common, and 25½% dimension, it would depend largely on what you call a dimension; if the dimensions figured poorer grades that would increase your #3 item materially, which probably would make your #3 grade ultimately run up to 40 or 50%, and it might also be possible that that particular stock of logs there might cut 18½%, because it may vary a little as to the slight difference in the timber. I have never experienced a case in which the [238—132] 1 and 2 common exceeded in percentage the 3 common.

Cross-examination by Mr. PARSONS.

I haven't been selling lumber the past year; I have been buying in the Spokane office. I have made Idaho and Washington and Montana, practically all the time the last two years, most of the time on the road at these different places. I was buying for

(Testimony of Charles Carter.)

the firm of Bradford-Kennedy Company; I am not now; at present I am with J. J. Nolin Company, Denver. I am buying specific orders as a dealer; I have been with this firm since September first. At the time of my visit to the yard of Donlan & Henderson I was with Bradford-Kennedy Company, and had been with them 15 years.

Redirect Examination by Mr. POPE.

I bought no lumber from dealers in bulk at fixed prices only the one item that was bought from the firm of Donlan & Hoyt. That was, I believe, the 14th of last February—1920. I think about when the market was at the peak. The price there was a basis of \$30, finished product. I made no purchase of bulk lumber at a higher figure than that. I made purchases of lumber in bulk that were in general the same grade as that at Pablo.

Recross-examination by Mr. PARSONS.

What I got from Hoyt and Donlan that time was represented by Donlan and Hoyt both to be very high class timber. The character proved that it wasn't quite as nice a stock of timber as it was represented to be. To my knowledge it was not material that was termed or designated as scrubby stock. [239—133]

Redirect Examination by Mr. POPE.

Asked to assume two cases, one in which the purchaser of a bulk stock of lumber makes advances

(Testimony of Charles Carter.)

of a certain number of dollars per thousand feet to enable the manufacturer to manufacture his lumber, and the other in which he makes no such advance, and to state the effect on the market obtainable, I will say where the advancement is made that person would have to buy the small margin, that is, less price per thousand than if he made no advance. I *should one* should have three to five dollars per thousand difference.

Recross-examination by Mr. PARSONS.

He should have that with interest besides, for his risk and his profit, of maintaining his sales organization, and so forth.

Witness excused.

Testimony of Edward Love, for Defendant.

EDWARD LOVE, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. POPE.

My name is E. W. Love; I live in Missoula; I am and for 15 years have been engaged in the lumber business; at the present time I don't represent any concern. I have in the past represented other wholesale lumber concerns. I have been buying lumber for concerns on commission, at Spokane and at Omaha. The last year I was looking after the shipping of some lumber at Pablo, and prior to that I bought quite a lot at Perma. I have seen the stock of lumber and logs that Donlan &

(Testimony of Edward Love.)

Henderson had at Pablo during the year 1920. I was located at Pablo at [240—134] that time, not, however, in connection with this operation.

I know of purchases of stocks of lumber in bulk, and that come from the mill, being made in Montana, during the spring and summer of 1920, which were in character similar to that stock of Donlan & Henderson's. I, myself, had a part in making negotiations of some such purchases in bulk. I knew from my own knowledge of such sales and purchases, what the market value of a stock of lumber of approximately 3,000,000 feet, such as Donlan & Henderson had at Pablo, was on August 3d, 1920; it was about \$30 per thousand feet. I calculated that under circumstances requiring the seller to plane and deliver on board cars. I know what equipment Donlan & Henderson had at that point for planing and loading on board cars, and am able, from my experience in lumber operations, to state what the cost of planing and loading on board cars would be; it would be about \$3.50 a thousand.

As to what difference it would make with the market for lumber whether it was to be sold in bulk, mill run, or the sales made in carload lots, loaded for delivery, I will say if I was to go out and buy a car of lumber I would expect to pay more money for one particular car than I would if I buy the entire cut; the reason for buying the entire cut I would expect to make a pretty good margin on it; you have to pay interest on your

(Testimony of Edward Love.)

money and then, in ordering cars, there is generally a shortage, and your order may be cancelled, and there are different things arises. The element of time required to load and ship out would make a difference in the margin. In my opinion, in view of the equipment which Donlan & Henderson had at that point at that time, and the quantity of lumber there on the 3d day of August, 1920, it would take about four months for them to put that through the planer and ship it out on cars. I figure [241—135] about five cars a week.

As to the bulk sales on which I based my opinion as to the market, there was Mr. Russell at Plains; the Owens Lumber Company, at Spokane, we purchased his entire cut; that was in December, 1919; and then I was negotiating a deal with Donlan & Hoyt in the winter of 1920, along in January and also a man named Rogers, at Roman. Those were all sales in which I personally took a part. I was at that time familiar with the sales that were being made, generally, through others. I had known at the time what were the prices obtained in the market generally for those bulk lots of lumber. My opinion as to the market value is based on information that I had in that way.

Cross-examination by Mr. PARSONS.

I ran a planer at Plains; I had a million and a quarter feet of lumber I bought from Mr. Russell; I bought that myself in the summer of 1919. It was W. O. Burrill's planer; I operated it myself

(Testimony of Edward Love.)

part of the time. As to whether that Russell cut was a sort of a bankrupt sale, the Farmers and Merchants Bank down there had quite a little money tied up in it. I don't think they made him sell it to stop foreclosure. I did not go with Bradford-Kennedy's man to see this Russell cut; I bought it myself.

I lived at Perma three or four years; I just had a small stock there; I would sometimes have a car-load at a time and up to three cars. I have been buying and selling lumber the last two years. I purchased a cut of lumber from Russell, at Plains, myself, and sold it out. Then I negotiated a deal with Russell with a lumber company of Spokane, and also with Donlan & Hoyt; I was the one who had the deal negotiated, and also a deal with Rogers. That deal was involved in a lawsuit. Russell, in the [242—136] Spokane deal, was not to my knowledge, involved in a lawsuit.

Witness excused.

Thereupon, counsel for the defendant read to the Court, as a part of the evidence on behalf of the defendant, the deposition of Earl De Veuve, as follows:

Deposition of Earl De Veuve, for Defendant.

Direct Examination by Mr. HALL.

My name is Earl De Veuve; age 46; occupation, assistant manager of the lumbermens Indemnity Exchange and the Inter-Insurance Exchange. I live here in Seattle. The Inter-Insurance Exchange

(Deposition of Earl De Veuve.)

is a co-operative insurance organization carried on by the various lumbermen that insure the properties one with the other. In my business as officer of the Inter-Insurance Exchange I have done business with the firm of Donlan & Henderson, of Montana. We carried insurance on their lumber yards and I believe on their mill; I am not positive about the mills at the present time. I have with me the policies that we issued on the property of Donlan & Henderson, at Pablo, Montana. The policies in this case were turned over to our attorneys, Donworth & Todd, with reference to the case against the Northern Pacific Railway, a subrogation case. We afterwards instructed Mr. Todd to send these policies to Eugene Davis, of Spokane, Washington, who was at that time representing some of the other companies in similar cases. I have not in my possession any of the proofs of loss that were submitted; they were also turned over to Donworth, Todd & Higgins for the same purpose as the policies. I have in my files letters or telegrams from Donlan & Henderson relative to the payment of the amount to be paid by reason of the fire loss.

The paper marked Identification "A" is a letter from Donlan [243—137] & Henderson instructing the Inter-Insurance Exchange to cover \$30,000 on lumber piled in new yard. The date of this letter is June 17th, 1920; the other papers attached are various acknowledgments. The paper marked "B" for identification is a letter from Donlan & Henderson addressed to the Inter-Insurance Ex-

(Deposition of Earl De Veuve.)

change, to cover \$30,000 on lumber in new yard, planing-mill buildings and additions \$2,500, lumber in planing-mill shed \$3,000, and planing-mill machinery, including boilers and engines, etc., \$2,500. In answer to that letter we issued insurance to that amount; we answered that by telegram and subsequently by letter. The paper marked "C" for identification is policy number 30,690, issued by the Inter-Insurance Exchange to Donlan & Henderson, dated July 20, 1920, amount of insurance \$22,500 on stock of lumber in new yard at Pablo, Montana. The document marked "D" for identification is policy number 30,532, issued by Inter-Insurance Exchange to Donlan & Henderson, under date of June 19th, 1920, covering \$30,000 on stock of lumber in their new yard at Pablo, Montana. We wrote other policies for Donlan & Henderson in the Inter-Insurance Exchange covering buildings and equipment as described in that letter. We placed \$7,500 with the Peninsula Fire Insurance Company; that covered the same stock that the Inter-Insurance Exchange policies covered, stock of lumber at Pablo, Montana. That was payable to the insured, as far as I know, unless there was an endorsement on it—to Donlan & Henderson. That loss was paid after the fire; the fire was August 3d, 1920.

The paper marked "E" for identification is a sworn statement of proof of loss to the Inter-Insurance Exchange, By Donlan & Henderson, under Inter-Insurance Exchange policy No. 30,690.

(Deposition of Earl De Veuve.)

In the transaction of our insurance business we require that sworn statement from the insured before we pay any loss, in all [244—138] cases; the claimants are required to make those sworn statements. The paper marked "F" for identification is a sworn statement of proof of loss to the Inter-Insurance Exchange on the Donlan & Henderson policy No. 30,532 of the Inter-Insurance Exchange, which was presented to us in due course of business the same as the other one just offered. That is signed individually by Edward Donlan and B. W. Henderson. These papers have been in the possession of myself or our attorney ever since they were submitted to us.

The paper which has been marked "G" for identification is an article of subrogation issued by Edward Donlan and Ben Henderson to the Inter-Insurance Exchange; the signatures to that instrument are those of Edward Donlan and Ben Henderson. That was probably delivered to our adjuster there in Pablo, or Spokane; I have no knowledge of that; it reached us by coming from our adjuster. The document marked "H" for identification is an article of subrogation issued by Edward Donlan and Ben W. Henderson to the Inter-Insurance Exchange on policy No. 30,352, received by us in the due course of business in connection with this loss.

Under policy No. 30,532, the final draft in payment was dated at our office October 26th, 1920. There had been an advance payment on September

(Deposition of Earl De Veuve.)

9th, 1920, of \$10,000. The payment under policy No. 30,690, the final draft was issued from our office on the 15th day of November, 1920, an advance payment was made on November 6th, 1920, of \$6,000. These show the receipts for the payment of loss.

The paper marked "I" for identification is a draft issued by the Inter-Insurance Exchange to Donlan & Henderson for \$20,000, being balance due on account of loss on August 3d, 1920, under policy No. 30,532; to this draft is attached a receipt [245—139] for the total amount of claim involved under that particular policy. The paper which has been marked "J" for identification is a loss draft issued by Inter-Insurance Exchange to Donlan & Henderson, in payment of \$15,937.50, being the balance due Donlan & Henderson on policy No. 30,690 on account of fire loss August 3d, 1920. Receipt for the total amount of \$22,500 is attached to this draft, the receipt being signed by Donlan & Henderson, by Ben W. Henderson and by Edward Donlan. We require a receipt; if a firm, either member can sign that. But in that case we evidently got them both to sign, as an extra precaution on the part of our adjuster, I presume.

We did not issue any policies on this lumber at Pablo in which Turner, Dennis & Lowry Lumber Company, a corporation, of Kansas City, Missouri, was named as the insured. I do not know Donlan and Henderson personally, and never met them; I never had any personal conversation with them. I

(Deposition of Earl De Veuve.)

am here in answer to a subpoena *duces tecum* issued by the United States District Court for the Western District of Washington, and ordered to bring these papers into court. All these papers that I have produced have been produced under subpoena *duces tecum*. My brother, James H. De Veuve, is out of town; I think he has no personal acquaintance with Donlan and Henderson; I don't think he ever met either gentleman. He would have no further records or correspondence that I have here.

Defendant's Exhibit "A," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is a letter from Inter-Insurance Exchange to Donlan & Henderson, dated June 25, 1920, reading as follows:

Defendant's Exhibit "A."

"Pursuant to our letter of June 19th we hand you herewith the above policy covering \$30,000 insurance on your Yard Stock, same having been issued in lieu of binder #1603. [246—140]

"Trusting the enclosed policy will be found entirely in order and again thanking you for the additional insurance * * * "

Also, a letter from Inter-Insurance Exchange to Donlan & Henderson, dated June 19, 1920, reading:

"In accordance with your favor of June 17th we have covered for you \$30,000 insurance on stock in New Yard and we enclose herewith Inter-Insurance Exchange of Seattle, Wash., binder #1603, which please accept as evidence of protection pending receipt of policy. * * * "

Also, a letter from Donlan & Henderson to Inter-Insurance Exchange of Seattle, Wash., dated June 17, 1920, as follows:

“Herewith enclose check amounting to \$337.50, being premium due on insurance of our sawmill and machinery for term of one year as per your insurance binder written June 1t0h, 1920.

“We desire you to write, effective at once, \$30,000.00 on lumber piled in yard designated as New Yard. At present this yard has a 200 ft. clear space, but in a short time lumber will be moved to give it a 250 ft. clear space.”

Defendant’s Exhibit “B,” attached to said deposition, consists of the following: A letter from Inter-Insurance Exchange to Donlan & Henderson, dated July 28, 1920, reading:

Defendant’s Exhibit “B.”

“Pursuant to our letter of July 20th we hand you herewith the above policies covering respectfully \$8,000 insurance on Planing Mill, Machinery and Stock, and \$22,500 insurance on Yard Stock, same having been issued in lieu of binders Nos. 1673 and 1680.

“Policy in lieu of Peninsular Fire Insurance Company binder will follow in due course.

“Trusting the enclosed * * * ” [247—141]

Also a letter from Inter-Insurance Exchange to Donlan & Henderson, dated July 20, 1920, reading:

“We acknowledge receipt of your favor of July 16th requesting us to cover \$30,000 additional insur-

ance on lumber in new yard and \$8,000 insurance on Planing Mill Building and Additions, Machinery therein and Stock therein.

“In reply we wish to confirm our telegrams to you of July 19th and this date reading as follows:

“‘Order sixteenth received covering all except new yard endeavoring to place will wire when covered.’

“‘Covering thirty thousand additional new yard thus completing order.’

“We now enclose herewith Inter-Insurance Exchange of Seattle, Wn., binder #1673 covering \$8,000 insurance on Planing Mill Building and Additions and Contents and Inter-Insurance Exchange of Seattle, Wn., binder #1680 covering \$22,500 insurance on stock in new yard, also Peninsular Fire Ins. Company binder #446 covering \$7,500 insurance on stock in new yard, all of which please accept as evidence of protection pending receipt of policies.

* * * ”

Also, Western Union telegram from James H. De Veuve to Donlan & Henderson, dated July 20, 1920, reading, “Covering thirty thousand additional new yard thus completing order.”

Also, Western Union telegram from James H. De Veuve to Donlan & Henderson, dated July 19, 1920, reading “Order sixteenth received covering all except new yard endeavoring to place will wire when covered.”

Also a letter from Donlan & Henderson, by B. W. Henderson, to Inter-Insurance Exchange of Seattle, Wash., dated July 16, 1920, reading:

“You will please write insurance as follows, policies to [248—142] be effective at once.

Lumber in New Yard.....	\$30,000.00
Planing Mill Building and Additions	2,500.00
Lumber in Planing Mill Shed which is an addition.....	3,000.00
Planing Mill Machinery, including Boiler and Engine and parts and Accessories thereto.....	2,500.00

“We would like the lumber in New Yard written up in separate policies of \$5,000.00 each, totalling \$30,000.00.”

Defendant's Exhibit “C,” attached to said deposition, then admitted in evidence over the plaintiffs' objection, is policy number 3,690 of the Inter-Insurance Exchange of Seattle, Wash., New York and Washington standard form, whereby the company insures Donlan & Henderson for a premium of \$337.50, from noon of July 20, 1920, to noon of July 20, 1921, in the amount of \$22,500 on property described as follows: On stock of every description, consisting principally of lumber, shingles, laths, mouldings, pickets, cross-pieces, stickers, posts, wood, telegraph poles, timber, and timber products, manufactured, and in process of manufacture, their own or held by them in trust or on commission or on consignment or sold but not removed or for which they may be held responsible; all while contained in yard known as New Yard, situate on premises occupied by assured as owners, lessees or operators, about one and one-half miles north of Pablo, Montana.

Defendant's Exhibit "D," attached to said deposition, then admitted in evidence over the objection of the plaintiffs, is policy number 30,532 of the Inter-Insurance Exchange of Seattle, Wash., New York and Washington standard form, whereby [249—143] the said company, for a premium of \$400, insures Donlan & Henderson, in the sum of \$30,000, for the term of one year from noon of June 19th, 1920, to noon of June 19th, 1921, against direct loss or damage by fire, upon the following described property: On stock of every description consisting principally of lumber, shingles, laths, mouldings, pickets, cross-pieces, stickers, posts, wood, telegraph poles, timber and timber products, manufactured, or in process of manufacture, their own or held by them in trust or on commission or on consignment or sold but not removed or for which they may be held responsible; all while contained in yard known as New Yard, situate on premises occupied by assured as owners, lessees or operators about one and one-half miles north of Pablo, Montana.

Defendant's Exhibit "E," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is a sworn statement in proof of loss made by the plaintiffs to the Inter-Insurance Exchange of Seattle, Washington, under policy number 30,690, which, after describing said policy and the terms thereof, and the various riders, permits and clauses thereof, describes the occurrence of the fire, the cause thereof; states the total insurance on the property to be \$60,000, the occupation and

ownership of the building described; states that no other person or persons had any interest, lien or encumbrance in or on the property insured; states that since the issuance of said policy there has been no assignment, or transfer, or incumbrance of said property, nor any change in the title, use, occupancy, location, possession or exposure of the same; and schedules the loss thereon caused by said fire and for which claim is made, as follows: [250—144]

Defendant's Exhibit "E."

1st Item of Policy	Cash Value	Whole Loss	Whole Insurance	Amount	Amount
				Named in this Policy	Claimed under this Policy
	92,813.57	92,813.57	60,000	22,500	22,500
TOTALS	92,813.57	92,813.57	60,000	22,500	22,500
TOTAL AMOUNT CLAIMED OF THIS COMPANY UNDER ABOVE-NAMED POLICY \$22,500.					

—the proof concluding with the usual printed portions of such proofs of loss, the signatures and verifications of Edward Donlan and Ben W. Henderson.

Defendant's Exhibit "F," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is a Sworn Statement in Proof of Loss, made by the plaintiffs to the Inter-Insurance Exchange of Seattle, Washington, under policy number 30,532, which, after describing said policy and the terms thereof, and the various riders, permits and clauses thereof, describes the occurrence of the fire; the cause thereof; states the total insurance on the property to be \$60,000; the occupation and

ownership of the building described; states that no other person or persons had any interest, lien or encumbrance in or on the property insured; states that since the issuance of said policy there has been no assignment, or transfer, or incumbrance of said property, nor any change in the title, use, occupancy, location, possession or exposure of the same; and schedules the loss thereon caused by said fire, and for which claim is made, as follows:

Defendant's Exhibit "F."

	Cash	Whole	Whole	Amount	Amount
1st Item of	Value	Loss	Insur-	Named	Claimed
Policy			ance	in this	under this
				Policy	Policy
	92,813.57	92,813.57	60,000	30,000	30,000
* * * * *					

TOTALS	92,813.57	92,813.57	60,000	30,000	30,000
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TOTAL AMOUNT CLAIMED OF THIS COMPANY UNDER ABOVE-NAMED POLICY \$30,000."

[251—145]

—the proof concluding with the usual printed portions of such proofs of loss, and the signatures and verifications of Edward Donlan and Ben W. Henderson.

Defendant's Exhibit "G," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is an Article of Subrogation, dated August 18th, 1920, wherein Edward Donlan and Ben W. Henderson, whose signatures are thereunto affixed, assign, transfer, set over and subrogate to the Inter-Insurance Exchange Insurance Company, of Seattle, Washington, their claims, etc., to the extent of \$30,000, against the Northern Pacific Railroad or any other party, person or corporation, who may be liable or thereafter adjudged liable for the

burning or destruction of the property insured by the assignee under its policy number 30,532, the consideration named being the payment of \$30,000 by the assignee under said policy.

Defendant's Exhibit "H," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is an Article of Subrogation, dated August 18th, 1920, wherein Edward Donlan and Ben W. Henderson, whose signatures are thereunto affixed, assign, transfer, set over and subrogate to the Inter-Insurance Exchange Insurance Company, of Seattle, Washington, their claims, etc., to the extent of \$22,500, against the Northern Pacific Railroad or any other party, person or corporation, who may be liable or thereafter adjudged liable for the burning or destruction of the property insured by the assignee under its policy number 30,690, the consideration named being the payment of \$22,500 by the assignee under said policy. [252—146]

Defendant's Exhibit "I," attached to said deposition, then admitted in evidence over the plaintiff's objection, is a draft for \$20,000 payable to Donlan & Henderson, drawn by the Inter-Insurance Exchange, dated October 26th, 1920, together with a receipt attached, and endorsement of "Donlan & Henderson by Ben W. Henderson, Edward Donlan," all as described by the witness to whose deposition it is attached.

Defendant's Exhibit "J," attached to said deposition, then admitted in evidence over the plaintiff's objection, is a draft for \$15,937.50, dated November 15th, 1920, drawn by the Inter-Insurance Exchange,

payable to Donlan & Henderson, together with a receipt attached, and endorsement of "Donlan & Henderson, by Ben W. Henderson, by Edward Donlan," all as described by the witness to whose deposition it is attached.

Thereupon counsel for the defendant read to the Court, as part of the evidence on behalf of the defendant, the deposition of Frank E. Partridge, as follows:

Deposition of Frank E. Partridge, for Defendant.

Direct Examination by Mr. HALL.

My name is F. E. Partridge; I live in Spokane, Washington, and my business is adjuster of fire losses for insurance companies; my age is 53. I am an independent adjuster, have no connection with any particular company, but adjust losses for any and all companies demanding my services. I am acquainted with Edward Donlan and Ben W. Henderson, doing business under the firm name and style of Donlan & Henderson, of Pablo, Montana. I have been acquainted with Ed. Donlan for about a year; Ben Henderson I met on or about August 4th, 1920. Since my acquaintance with them I have been called upon to adjust [253—147] a loss by fire on property belonging to them. I adjusted a loss on property owned by Ed. Donlan on a fire that occurred, I believe, in January, 1920; the fire was at Thompson Falls, Montana.

I adjusted a loss on property belonging to Donlan & Henderson upon property located at Pablo, Montana, on a fire that occurred August 3, 1920. It was

(Deposition of Frank E. Partridge.)

lumber piled in the mill yard that was destroyed. I have in my possession records that show the piles and number of feet of lumber that were destroyed in that fire. I have a statement filed with me by Donlan and Henderson, purporting to show the amount of lumber in the old yard. That purports to show all the lumber that was destroyed for which they made claim to me. The instrument I hold in my hand is designated by Donlan & Henderson as "Inventory, Old Yard, April 1, 1920," and purports to contain a piece tally of the lumber contained in that yard at that date; that purports to be the lumber that was destroyed by the fire that I have already testified about. I am not willing that the original may be attached to my deposition as an exhibit, and decline to surrender the original, but will deliver it to the stenographer for the purpose of making a copy only.

I adjusted the losses on the Donlan & Henderson fire on the 3d of August for the American Insurance Company of New Jersey, covering \$25,000; Firemen's Fund of San Francisco, covering \$25,000; Palatine Insurance Company of Great Britain, covering \$20,000. I don't know to whom this money was paid. My file shows that the policy was running to Donlan & Henderson.

I talked to both Donlan and Henderson concerning ownership of this property that was destroyed in the August fire, more particularly to Ed. Donlan. That was on or about August [254—148] 10, 1920, at the Donlan & Henderson office, in Pablo,

(Deposition of Frank E. Partridge.)

Montana. I had various conversations with them during that day, all of which were in the presence of various persons. Otto R. Daly, Mr. Keith, a bookkeeper for the firm, whose name I do not know. Sometimes the conversations were in the presence of both partners, other times in the presence of only one partner. At times we were entirely alone, but at other times, in the presence of the parties I have named. Our conversation was so general that it would be difficult to tell all that was said. At one time we were talking of the origin of the fire, and another time of the quantity of material, quality and various things in connection therewith. Mr. Donlan, at that time, made statements to me concerning the ownership of the property destroyed. He stated that Donlan & Henderson purchased this property from Smead on or about April 1, 1920. He said Donlan & Henderson was the owner of the lumber at the *property* it was destroyed, subject to an interest of Turner, Dennis & Lowry, and he told me what the interest of Turner, Dennis & Lowry Lumber Company was—that they had advanced money to Donlan & Henderson, and the amount, I believe, is shown in policy. My recollection is that it was either twenty or twenty-five dollars per thousand. I don't seem to have an exact copy of that policy here. This advance was made in a contract of sale, and I asked him for a copy of that contract of sale, and he said he didn't have it. A statement was made to me at that time referring to this subject matter; that Donlan & Hen-

(Deposition of Frank E. Partridge.)

derson was not the owner of the lumber, but that it belonged to Turner, Dennis & Lowry Lumber Company. That statement was that they had advanced \$20 a thousand on a contract of sale. I asked Donlan for a copy of it and he said he didn't have a copy at the office, but I understood him to say he [255—149] had a copy in his office in Missoula. They claimed that they had made an outright sale of all that lumber that was destroyed to Turner, Dennis & Lowry. My recollection is that they had made a sale under this contract to them. I never obtained a copy of the contract, nor read a copy of it; they never supplied me with a copy of it.

As to whether Donlan & Henderson made the proof of loss, it must have been signed by Donlan & Henderson, but I haven't any definite recollection of seeing the proof after it was signed. I made up proofs of loss for the three companies and mailed them to either Ed. Donlan at Missoula, or Donlan & Henderson, at Pablo. It was several weeks before they were finally returned to me, and I haven't a definite recollection of seeing them after they were returned, but would state that they must have been signed by Donlan & Henderson in the manner in which I asked them to have them signed, or they would never have been sent on to the company. I do not have a copy of the policy in my office. I mailed them to the San Francisco offices of the companies making them.

I have not in my office a copy of the proof of loss, any more than a condensed copy of the inventory

(Deposition of Frank E. Partridge.)

which is given to the stenographer to keep; it is a condensed copy of that. The proof of loss would now be in the office of the several companies in San Francisco, if it has not been sent on to the home office. The Fireman's Fund proof of loss should be in the home office in San Francisco.

I am not willing that the original paper now handed to the stenographer and marked Exhibit "B" for identification may be attached to my deposition as an exhibit, and I decline to surrender the original. Defendant's Exhibit "B" is a blank form of proofs of loss which I use in my business. When the proof [256—150] of loss is made it is necessary to file a sworn statement like Defendant's Exhibit "B." In a case of a copartnership, one or both members make that statement. The statement should be signed by the firm name, by whichever member of the firm wields the pen, and that member of the firm is supposed to be sworn to in the jurat below. In this case there was proof of loss made out by either Donlan or Henderson, or both of them, upon a blank similar to Defendant's Exhibit "B." I couldn't say positively that it was signed and sworn to before a Notary Public as to the contents of it, as I have no recollection of seeing them, but my strong opinion is that it was, or it would never have been sent on to the companies. In the ordinary course of business that is the way it must have been done, or otherwise they would not have been sent; in this case it must have been done.

The paper marked Defendant's Exhibit "C" is

(Deposition of Frank E. Partridge.)

a copy of the schedule referred to in the proof of loss. The original is supposed to be in the San Francisco office of the different companies. The original was made up from the detailed piece tally which was furnished me by the assured, Donlan & Henderson. This paper is what you call a statement of loss. It purports to show the claim of the assured on lumber destroyed and contained in the old yard at the time of the fire. The copy that is attached to the proof is with the files in San Francisco. The copy, Exhibit "C," which counsel holds in his hand, is part of my office records. I am not willing that this paper may be filed and attached to the deposition; I desire to keep that as part of my office files, but I am willing that the stenographer may make a copy of this to attach to the deposition.

I saw the policies; these are the policies that I presume [257—151] have been sent to San Francisco in due course of business to the head office of the companies, as that is the natural course of business. None of these policies referred to were issued in the name of Turner, Dennis & Lowry Lumber Company. These that I have testified about were all issued in the name of Donlan & Henderson with, as I recall it, the loss payable clause to Turner, Dennis & Lowry, covering the amount of their advance on contract of purchase.

I had nothing whatever to do with the payment of the money. In my business I simply adjust the loss and arrive at how much the assured has been

(Deposition of Frank E. Partridge.)

injured, make a report to the company and the company settles the matter themselves. I have in my files just one letter from Donlan & Henderson in reference to this fire. That letter is marked Defendant's Exhibit "D"; it is part of my office file and I desire to keep it in my office; I am willing that the stenographer may make a copy of it and attach to my deposition. The letter, Exhibit "D," was received by me in the due course of mail from Donlan & Henderson. I presume there were enclosures with the letter but I don't have any recollection on the subject. As to whether or not my office received at about that time the proof of loss and articles of subrogation referred to in this letter, my stenographer informed me those were received and forwarded to the company. That would be done by my clerk without my knowledge.

The Articles of Subrogation referred to in this letter subrogates the right of action against the Northern Pacific Railway Company, on account of the presumption that they may have set the fire. I have not a copy of the Articles of Subrogation referred to, and do not know by whom that was signed. In the ordinary course of business they should have been signed [258—152] by Donlan & Henderson and Dennis, Turner & Lowry. I have no knowledge now as to who all signed them; I have no recollection of having seen them. I do not know how much or the total insurance that was paid to Donlan & Henderson; I don't know for the companies that I adjusted for.

(Deposition of Frank E. Partridge.)

As to whether Donlan or Henderson told me, or said anything to me at the time I had the conversation with them at Pablo to which I have already testified, about what was to be done with the lumber after they had repaid Turner, Dennis & Lowry the \$20 or \$25 a thousand that they had advanced on the lumber, there was no direct conversation as to their ever paying that advance. My understanding was that that was part of the contract of the sale and that advance was to be repaid in the course of execution of the contract, in lumber. There was no direct conversation as to repayment; in fact, I didn't understand that they were to ever be repaid; that was in furtherance of the contract to purchase. There was no conversation in regard to repaying.

As I have already stated, in regard to the contract of purchase, Senator Donlan said that the lumber was sold to Dennis, Turner & Lowry on a written agreement, and that they had advanced to Donlan & Henderson so much per thousand feet; the lumber was to be shipped to Turner, Dennis & Lowry. They didn't say anything to me about this \$20 a thousand advance by Turner, Dennis & Lowry, that it was to be paid back; there was no conversation as to their ever paying back that money. This lumber was sold, and they paid so much on the contract. As to whether anything was said by Donlan or Henderson, or either of them, about what compensation Turner, Dennis & Lowry was to be paid for selling the lumber, I didn't understand that

(Deposition of Frank E. Partridge.)

they were to sell the lumber. I gathered from the talk [259—153] that there was a contract in existence whereby Donlan & Henderson sold Dennis, Turner & Lowry the lumber in this old yard and had received \$20 a thousand advance for the lumber, the balance to be paid as delivered. I had no particular interest in the detail of that contract except to ascertain that Donlan & Henderson had an insurable interest in this lumber of such amount as would warrant my accepting proofs of loss. I did find that an insurable interest, and for that reason I accepted the proofs of loss from Donlan & Henderson.

Defendant's Exhibit "A," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is in words and figures as follows, to wit:

Defendant's Exhibit "A."

INVENTORY OLD YARD—4-1-20.

591 Pcs.	1 x 4—12	No. 1 & 2 Com.	2,364	
1281	14	"	5,978	
1457	16	"	7,771	16,113
1644	1 x 6—12	"	9,864	
1824	14	"	12,768	
5017	16	"	40,136	62,768
1946	1 x 8—12	"	15,568	
2371	14	"	22,130	
9092	16	"	96,980	134,678
1746	1 x 10—12	"	17,460	
1092	14	"	12,750	
6627	16	"	88,360	118,560
805	1 x 12—12	"	9,660	
1126	14	"	15,765	
10705	16	"	171,282	196,706
	8 x 10 ft.			21,680

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1471	1 x 4—12	No. 3 Com.	5,884	
2501	16	"	13,339	19,223
1541	1 x 6—12	"	9,246	
1327	14	"	9,289	
4391	16	"	35,128	53,663
1289	1 x 8—12	"	10,321	
1104	14	"	10,304	
6233	16	"	66,485	87,101
1183	1 x 10—14	"	13,794	
4060	16	"	54,133	67,927
830	1 x 12—12	"	9,960	
1119	14	"	15,666	
5545	16	"	88,720	114,346
	Mixed 18 & 20	"		18,180
	" 8 & 10	"		5,025
	No. 4 Boards			207,539
				<hr/>
For'd			1,123,509	

[260—154]

INVENTORY OLD YARD—4-1-20.

				1,123,509
1838	Pcs. 2 x 4—12	No. 1 Com.	14,704	
8326	14	"	21,709	
8218	16	"	87,658	
12	18	"	144	
1	20	"	13	124,228
9	2 x 6—10	"	90	
1082	12	"	12,984	
1962	14	"	27,468	
7133	16	"	114,098	
82	18	"	1,476	
78	20	"	1,560	
19	24	"	456	158,132
4	2 x 8—10	"	53	
707	12	"	11,312	
1016	14	"	18,966	
3240	16	"	64,965	
236	18	"	5,664	
20	20	"	533	
10	24	"	320	101,813
2	2 x 10—10	"	33	
388	12	"	7,760	

488	14	No. 1 Com.	11,387	
1094	16	"	29,173	
312	18	"	9,360	
89	20	"	2,967	
8	22	"	294	
6	24	"	240	61,214
2	2 x 12—10	"	120	
166	12	"	3,984	
280	14	"	7,840	
1359	16	"	43,488	
156	18	"	5,616	
23	20	"	920	
6	22	"	264	
7	24	"	336	62,568
				<hr/>
			For'd.	1,631,464

INVENTORY NEW YARD—4-1-20.

				1,631,464
6 Pcs.	2 x 14—16	No. 1 Com.	224	
4	24	"	224	
1	2 x 16—10	"	27	
8	16	"	341	
3	2 x 18—16	"	144	
3	2 x 20—16	"	160	
1	2 x 12—18	"	36	1,156
Mixed widths and lengths				28,444
1	3 x 8—12	Com.	24	
36	16	"	1,152	
1	3 x 10—10	"	25	
2	14	"	70	
56	16	"	2,240	
1	18	"	45	
4	3 x 12— 8	"	96	
4	10	"	120	
194	12	"	6,984	
1076	14	"	45,192	
290	16	"	13,920	
3	3 x 14— 8	"	84	
3	12	"	126	
[261—155]				
5	20	"	350	
1	4 x 4—14	"	19	
4	16	"	85	

330 *Edward Donlan and Ben W. Henderson vs.*

3	4 x 5—12	"	60
6	16	"	160
3	4 x 6— 8	"	48
2	10	"	40
1	12	"	24
5	14	"	140
12	16	"	384
5	20	"	200
4	6 x 6— 8	"	96
117	12	"	4,212
4	14	"	168
467	16	"	22,416
1	18	"	54
			<u>98,534</u>

For'd

1,759,598

INVENTORY OLD YARD—4-1-20.

1,759,598

3	Pcs. 6 x 8—12	Com.	144
5	14	"	280
2	8 x 8—12	"	128
1	16	"	85
1	3 x 14—16	"	56
5	12 x 12—14	"	840
2	18	"	432
Mixed Dim.			39,938
Cross stripes clear piles			54,109
Roofs " "			11,206
1¼" Clears			19,628
Wide " 1"			18,687
Mixed widths 1"			7,203
1 x 4s			81,258
6s			89,945
8s			61,484
10s			52,421
12s			26,357
2" All W & L			32,908
			<u>497,109</u>
			2,256,707

Defendant's Exhibit "B," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is an ordinary blank form of Sworn Statement in Proof of Loss, designed for proof under policy issued by any company.

Defendant's Exhibit "C," attached to said deposition, then admitted in evidence over the plaintiff's objection, is in words and figures as follows, to wit:

Defendant's Exhibit "C."

STATEMENT OF LOSS.

DONLAN AND HENDERSON.

PABLO, MONTANA.

[262—156]

FIRE AUGUST 3, 1920.

OLD YARD:

Inventory of yard 4-1-20	2,256,707 ft.	
Shipments of lumber taken out of yard and shed since inventory.....	292,023'	
Shed inventory 8/5.....	66,461	
	<hr/>	
	358,484	
Less purchased in shed..	106,486	251,998
	<hr/>	
	2,004,709 ft. @ \$35.00	\$70,164.82
2 hand carts.....		110.29
Interest on \$20,000.00 3/25.....		577.77
" " \$52,589.40 4/15.....		1,285.55
Difference between our inventory and amount we will have to settle on with parties from whom purchased	8,813	308.46
Insurance		1,575.00
	<hr/>	<hr/>
	2,013,522 ft.	\$74,021.89

(Deposition of O. R. Daly.)

Lumber bought from Smead—SOUND VALUE LOSS &
DAMAGE.

New Cut piled on old bottoms.

8000 ft. 1½" shop and better @ \$37.00 cost of manufacturing	296.00
4000 " 1" " " " " " " " "	148.00

SOUND VALUE LOSS AND DAMAGE in Old Yard..\$74,465.89

* * * * *

SCHEDULE OF INSURANCE AND APPORTIONMENT OF CLAIM.

Policy No.	Company.	Insures.	Pays.
223412	American Insurance Company	\$25,000.00	\$25,000.00
884833	Firemen's Fund " "	25,000.00	25,000.00
1092524	Palatine Insurance Company	20,000.00	20,000.00
		<u>\$70,000.00</u>	<u>\$70,000.00</u>

Defendant's Exhibit "D," attached to said deposition, then admitted in evidence over plaintiffs' objection, is a letter, dated Aug. 17, 1920, from Donlan & Henderson to Frank E. Partridge, Spokane, Wash., reading as follows:

Defendant's Exhibit "D."

"You will find enclosed Proofs of Loss and Articles of [263—157] Subrogation which were enclosed with the policies in your letter of the 11th inst. These are signed as per your instructions."

Counsel for the defendant then read to the Court as part of the evidence on behalf of the defendant, the deposition of O. R. Daly, as follows, to wit:

Deposition of O. R. Daly, for Defendant.

Direct Examination by Mr. HALL.

My name is O. R. Daly; my age 37, my occupation fire insurance, and my residence Spokane,

(Deposition of O. R. Daly.)

Washington. My particular line of fire insurance is sawmill, wood-work, manufacturers and lumber. I both write insurance and am an adjuster. I know the firm of Donlan & Henderson, of Pablo, Montana, and am personally acquainted with the members of that firm. Their names are Ben W. Henderson and Ed. Donlan. I have had business dealings relative to fire insurance with these parties within the last year. I wrote the insurance on their sawmill operations at Pablo, and also wrote insurance covering the new cut of lumber in the mill yard. In the insurance which I wrote I made up the policies myself; those policies were payable to Donlan & Henderson. I insured them in the Inter-Insurance Exchange of Seattle, Washington. The total amount of insurance placed through me on the Donlan & Henderson lumber at Pablo was \$60,000.00, and this amount was all payable to Donlan & Henderson.

I had conversations with Donlan or Henderson relative to their relations with the defendant, the Turner, Dennis & Lowry Lumber Company. The first conversation took place in the latter part of April, 1920. Now, we talked about it more or less, but in the final talk we had, I don't think there was a soul present except Ed. Polleys and myself. My conversation was with [264—158] Ben W. Henderson; also about July 23 or 24 I again talked it over with him. In the first conversation with him in April I told him that I would like the insurance on his mill and on his yard and he told

(Deposition of O. R. Daly.)

me he would have to take the matter up with his partner, Mr. Donlan; that they would not be ready to place any insurance on the mill until they were ready to start it up; that they would not be ready for any insurance on the yard until the new cut had started to come into the yard, as the lumber in the yard at that time was all insured by the former owner. I told him that we could take it up by correspondence, which we did. I first talked to Mr. Henderson as to any dealings he may have had with Turner, Dennis & Lowry Lumber Company at the time I have just told about. Mr. Henderson told me that Turner, Dennis & Lowry Lumber Company were backing their operation, but he did not state the particulars. I did not afterward learn what the particulars were, except in a general way. That conversation was with Ben Henderson about July 23d, at Pablo, Montana. I had a friend from Portland with me; I don't believe there was anybody else present; possibly the bookkeeper. The only thing that came up that I can remember was that I tried to get Mr. Henderson to put \$20,000 additional insurance on his yard stock, but he told me he didn't want to do it right then until he heard from Turner, Dennis & Lowry. It seems that they had taken a check up of the yard a few days previous to the time I was there and he had not yet heard from that check up. I don't recall the exact date of the next conversation I had with him but it was shortly after the fire and at the time Mr. Partridge was

(Deposition of O. R. Daly.)

there on the adjustment. There were present at that conversation Mr. Partridge, Mr. Donlan, Mr. Henderson, Mr. Keith and the bookkeeper. Nothing was said by Mr. Henderson at that time relative to the dealings with [265—159] Turner, Dennis & Lowry Lumber Co., so far as our case was concerned, except that they were interested, as above stated and as our forms on our policies did not necessitate absolute ownership, I did not go into the matter further.

Neither Mr. Henderson or Mr. Donlan, at that time or at any other time, told me that Turner, Dennis & Lowry Lumber Company were the sole owners of that lumber; nor did they tell me at that time that they had sold or disposed of their interest in the lumber to that company. If either Donlan or Henderson had told me, or if I had known that they had sold their entire interest in the lumber to the Turner, Dennis & Lowry Lumber Company, and given them a bill of sale for the same, and delivered possession of the lumber to them, and had no further interest in the lumber, I would not have written the insurance in the name of Donlan & Henderson except as trustees, possibly.

I did not have any conversation in particular with Mr. Donlan relative to his deal with the Turner, Dennis & Lowry Lumber Company. He was present at the time that I have heretofore testified to when I said that a number of us were present in the office and Henderson made the state-

(Deposition of O. R. Daly.)

ment that I have testified to; he took part in that conversation. I do not recall any statement Ed. Donlan made to me at that time regarding the deal with Turner, Dennis & Lowry Lumber Company, and nothing particular in my presence except along the general conversation.

Mr. Donlan did not at any time make any statement to me or in my presence relative to the firm having sold and disposed of all their interest in the lumber and given a bill of sale to Turner, Dennis & Lowry Lumber Company; I could not have made up proofs of it either if these parties had given that information. I made up the proofs of loss on the policies issued by me. I mailed them to Ben W. Henderson, Pablo, for signature. [266—160] I got them back afterward, signed by Ben W. Henderson and Ed. Donlan; I then forwarded them on to our Seattle office for payment; that is the office managed by James H. DeVeuve and Earl DeVeuve. I never had any proofs of loss signed by Turner, Dennis & Lowry Lumber Company, and no claim was ever made by them. I never issued any insurance on this lumber at Pablo in which Turner, Dennis & Lowry Lumber Company were named as the insured; nor did I issue any insurance on this lumber at Pablo in favor of that company. The payment of the loss was not made through me; direct from Seattle. I would not know when it was made or how much.

Thereupon, at 3:35 o'clock P. M., recess was taken until 9:30 o'clock A. M., of Thursday, June

9th, 1921, at which time the trial of said cause was resumed.

**Testimony of L. X. Juneau, for Defendant
(Recalled).**

L. X. JUNEAU, a witness recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. POPE.

I was on the stand and sworn yesterday. There was an advance made by Turner, Dennis & Lowry Lumber Company on the old stock up there that was dry, and then on the green stock. The dry was the 2,000,000 feet. The shipments of cars were made from the old stock. On August 3d, when I made my inventory, there were some unfinished piles there. The unfinished piles, as they were made there, ran, as to grades and quality, about the same as the finished piles. The piles were made just as the lumber arrived at the mill, in the transfer, when they rigged it out. When a pile reached a certain height it was covered and a new pile of the same grade and quality started. [267—161]

Cross-examination by Mr. PARSONS.

I don't know exactly how many hundred thousand feet there was in the yard at the time of the fire that belonged to Donlan & Henderson, and had not been transferred to us; I haven't got the figures here; something about 400,000; something like that. As to whether there were tramways and bases and bottoms for those piles that belonged

(Testimony of L. X. Juneau.)

to Donlan & Henderson, the most of the bottoms were tallied in with the piles. We generally took the figures from the piles and checked with Mr. Rapp. The figures Mr. Rapp put on the piles I adopted, if I thought they were right, and if I didn't I would check it over.

Witness excused.

**Testimony of Thomas S. Dennis, for Defendant
(Recalled).**

THOMAS S. DENNIS, a witness recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. POPE.

I have computed the percentage of the various grades shown on the June 28th inventory, taken by Mr. Juneau, which was offered in evidence yesterday. That inventory covers all the new lumber which had been sawn up to that date. That inventory, referring now to Defendant's Exhibit 18, reduced to percentages, shows $12\frac{1}{2}\%$ of dimensions; 10% 4 and 5 common; $30\frac{1}{2}\%$ 3 common; $19\frac{1}{2}\%$ 1 and 2 common; 9% shop and shop common; $18\frac{1}{2}\%$ selects and factory selects. Those are substantially the percentages ordinarily produced by a stock of lumber and timber such as that which existed there; I would say that those percentages are liberal; the selects, I think, would hardly grade that much when actually taken down out of the pile. This compilation however, is unquestionably liberal, and in connection [268—162] with this, I have tried to give the inventory all the benefit

(Testimony of Thomas S. Dennis.)

of the doubt; for instance, I have treated all covered boards and closed piles as #3 common, while it is quite likely by the time they came out of the piles they would be #4 or coarser; and in the June 28th inventory there are shown #4 dimensions, which I have treated as dimension, without throwing it in #4 grade. I would say that these percentages are substantially the averages of what you would expect from that class of timber, marketed under those conditions.

Since this case started we have been served with a new bill of particulars, marked "August 3d Bill of Particulars," which is the basis on which certain witnesses have testified before. I have examined that bill of particulars covering the lumber here claimed to have been sold to our company, outside of the original 2,000,000 feet of lumber, for the purpose of determining the percentages of the grades shown by it. Those percentages average 8% of dimension; 5% #4 and #5 common; 27% #3 common; 27% #1 and #2 common; no shop common; 1½ of 1% of shop; and 32½% selects and factory selects.

I have compared, item by item, the totals of the various grades shown on the June 28th inventory, with the same items or corresponding grades in this new bill of particulars. On the June 28th inventory there was shown 112,000 feet of dimension; on the August 3d inventory there was shown 105,000 feet of dimension. On the June 28th inventory there is shown 90,000 feet of 4 and

(Testimony of Thomas S. Dennis.)

5 common; on the August 3d inventory there is shown 66,000 feet of 4 and 5 common. On the June 28th inventory there is shown 273,000 feet of 3 common; on the August 3d inventory there is shown 359,000 feet of #3 common. On the June 28th inventory there is shown 171,000 feet of #1 and 2 common; on the August 3d inventory there is shown 362,000 feet of #2 [269—163] common. On the June 28th inventory there is shown 11,000 feet of 5/4 shop; on the August 3d inventory there is shown 8,000 feet 5/4 shop. On the June 28th inventory there is shown 69,000 feet 4 quarter shop common; on the August 3d inventory there is shown no 4 quarter shop common. On the June 28th inventory there is shown 164,000 feet selects and factory selects; on the August 3d inventory there is shown 436,000 feet selects and factory selects. Those figures are given in round numbers; any amounts less than a thousand feet are dropped. The August 3d bill of particulars, if it shows lumber on hand August 3d, which had been cut up to that time would include all of the July cut on which we had made advances which covered all of the July cut, which had gone into the finished piles. All those grades do not show increases between June 28th and August 3d.

The items of dimensions show a decrease of some 6,000 feet; the 4 and 5 common show a decrease of some 24,000 feet; the 4 quarter shop common shows a decrease of 69,000 feet and the 5/4 shop shows a decrease of 3,000 feet. The increase shows

(Testimony of Thomas S. Dennis.)

in the #3 common, which shows an increase of 86,000 feet; the 1 and 2 common, which shows an increase of 190,000 feet, and the selects and factory selects, which shows an increase of 272,000 feet. The selects and factory selects and the 1 and 2 common, which show the greatest portion of increase, are the highest grades manufactured under this operation. Those stocks or grades in which the decrease appears between the June 28th inventory and the bill of particulars, are, as a rule, lower grades, with the exception of the 5/4 shop.

As to whether, with respect to the dimension lumber there, in which there would appear to be less dimension on August 3d than June 28th, under the circumstances and with the equipment with which Donlan & Henderson were sawing there at Pablo, it [270—164] would be possible to cut logs during July without producing dimension lumber from such logs, I will say it would be physically impossible for them at that time, with the equipment they had, to saw their logs without getting a least one piece of dimension out of each log. Comparing the dimension items shown in the two inventories, I find that, taking each item of dimension, from 2x4-10 to 2x12-20, that the quantity shown on the inventory of June 28th and August 3d, were practically exact.

There are several differences in grades and varieties of shop. The inventory contemplated 4 quarter shop, 5/4 shop and 6/4 shop; 5 and 6 quarter shop are graded on grades known as #1

(Testimony of Thomas S. Dennis.)

shop, #2 shop and #3 shop. They are the more valuable varieties of shop, and of course the #1 shop is the most valuable of the three grades of shop. The 4 quarter is not graded on grades; it is simply thrown into the grade called shop common, which in common, would be in value approximately slightly above the value of #3 common, which is a lower variety or grade in value of lumber. The decrease appears in both varieties of shop between the June 28th inventory and the August 3d bill of particulars, about 3,000 in the 5 quarter and to a difference of some 69,000 feet in the 4 quarter shop. It would be difficult to state what has become of the 69,000 feet of 4 quarter shop which does not appear in the August 3d bill of particulars, so far as this inventory shows, excepting by comparing the two inventories, I find on the inventory of June 28th that there are no 4 quarter factory selects and on the August 3d inventory there are 85,000 feet 4 quarter factory selects. The difference in value between the 4 quarter shop and the 4 quarter factory selects I would estimate somewhere between \$20 and \$25 per thousand. [271—165]

The August 3d inventory treats the selects as C and better, and that August 3d bill of particulars purports to include all the new cut on which we had made our advance. The June 28th inventory, Defendant's Exhibit 18, shows all the selects were graded and inventoried as D and better. D is a lower grade than C. If a stock of lumber is

(Testimony of Thomas S. Dennis.)

graded D and better, the proportion that is D varies under certain conditions, but on such an operation as that it would run to 50 to 60% of D and 40 to 50% of C and better. That would make a difference in price of probably ten to fifteen dollars at the outside, \$20.00 per thousand, between the higher and lower grades of the selects.

Asked to state what a comparison of the June 28th inventory and the August 3d bill of particulars would show the July cut to have been, I will say, reducing it to percentages, it would indicate that of the lumber accounted for as having been sawn or accumulated there, 15½% would be #3 common, 35% 1 and 2 common, and 49½% selects and factory selects. The selects and factory selects and 1 and 2 common are the higher grades of lumber. The two percentages taken together would make 84½% of the entire amount shown to have been cut. I would say it is ridiculous to consider it possible to produce such a cut as that from any sort of timber stand.

Cross-examination by Mr. PARSONS.

I am taking as a basis this Exhibit 18, made by Mr. Juneau, as representing the June 28th inventory. There was no inventory made in April or May; we didn't enter into this contract until April 16th, and that contract was based on the 2 million and some thousand feet of the old Smead cut, of which no inventory was taken until the first inventory was made on June 28. [272—166]

I made my account as counsel asked me to make

(Testimony of Thomas S. Dennis.)

out yesterday. I said that I went from Kansas City to meet Mr. Donlan in Chicago, and had a talk with him there. It is possible that I was at the Congress Hotel in Chicago, at the time he got there from New York; but I was not there when I received the wire from him.

I can't give you the exact date I received this \$60,000 from Senator Donlan; it was sometime after the 20th of September—following that—between that and the first of October. It was either the same day I submitted our Exhibit Number 1 or the day previous to my having made this statement. That would be in the period about the last of September or the first of October.

Redirect Examination by Mr. POPE.

I stated that one car was shipped after the fire; there were no other shipments made after the fire than that one car. That was because we were waiting for authority from Donlan & Henderson to hand over their stock on the market. There was no lumber on hand after the fire except a small amount of miscellaneous items in the shed, part of which were shipped out in the car that was shipped after the fire. Of course, they started sawing again shortly after the fire and began to pile up stock, but that was all in green and unmerchantable condition for sixty and ninety to a hundred *a* twenty days after the fire. Defendant's Exhibit 21 is the letter that I sent to Donlan & Henderson on the date there shown respecting orders and shipments of cars of lumber.

Defendant's Exhibit 21, then admitted in evidence without objection, is a letter dated November 17, 1920, from Turner, Dennis & Lowry Lumber Company [273—167] to Donlan & Henderson, reading as follows:

Defendant's Exhibit No. 21.

“On October 30th we wrote you reference to market conditions as we found them at that time suggesting that you advise us whether or not you wished to offer your stock at present at competitive prices.

“As we stated in our letter, the Weyerhaeuser list is being used practically as a basis for making quotations although some items that are particularly plentiful, especially Fir & Larch Common and #3 Common Western White Pine are being sold in some instances at \$2.00 or \$3.00 or even \$4.00 or \$5.00 less than the Weyerhaeuser list. We do not find any great increase in trade as yet although there has been a considerable improvement in inquiries which is bound to develop into business sooner or later.

“We wish you would advise us whether or not you wish to take on any business on the basis of present competitive prices or if you prefer holding your stock awhile longer. While it is proving a very heavy burden for us to carry at this time to refrain from shipping the stock from our contract connections, yet we prefer being governed entirely by your wishes and if you feel that it is best to

(Testimony of Thomas S. Dennis.)

carry the lumber for a better market we will see you through just so long as our financial resources will permit. Selfishly we would rather ship the lumber out on to-day's market as the difference in our commission would be relatively small and it would result in releasing heavy amounts of money which we find we are very much in need of on account of the very slow collections from retail dealers a number of whom we have had to grant extensions of thirty, sixty, ninety and even one hundred and twenty days, but we want to make our connections with you just as profitable and attractive to you as possible and will be governed by your wishes just so long as [274—168] conditions will permit.

“Will you please give this matter serious consideration and let us hear from you at your early convenience.”

By the WITNESS.—We did not receive a reply to this communication from Donlan & Henderson. Defendant's Exhibit 22 is a letter which we sent to Donlan & Henderson on December 15, 1920.

Defendant's Exhibit 22, then admitted in evidence without objection, is a letter dated December 15, 1920, from the defendant company to Donlan & Henderson, reading as follows:

Defendant's Exhibit No. 22.

“We are addressing you at Pablo and also sending a copy to Mr. Donlan at Missoula as we are anxious that both Mr. Henderson and Mr. Donlan receive this letter.

“We have just received copies of Mr. Lowry’s letters of December 8th and 9th addressed to Mr. Donlan at Missoula with reference to the various matters at issue. We are sorry to note that Mr. Henderson did not feel justified in allowing the bill of sale to be attached to the draft as we do not see how we can consistently pay the draft unless the bill of sale is released, and if the bill of sale and the draft were sent together through the bank it would be impossible for us to obtain the bill of sale without first paying the draft, so you would be entirely protected. We judge that Mr. Henderson must have had some reason for this, but we do not understand just what it could be.

“We note by Mr. Lowry’s letter of the 8th addressed to Mr. Donlan, that Mr. Henderson had agreed to deposit the bill of sale in the bank and attach to the draft the bank’s acknowledgment and the bank’s agreement to deliver the bill of sale on [275—169] payment of the draft. This doubtlessly would be satisfactory and if the draft comes in with the acknowledgment of the bill of sale and it is so worded as to properly protect us, we judge it will be acceptable to us in that form.

“Regarding the insurance, this subject unfortunately seems to be a bone of contention between us and there is no reason in the world why it should be. Mr. Lowry has covered the matter very clearly in his letter and we really feel that you should strain a point and let us have these policies. However, if you cannot consistently do this, Mr. Lowry has suggested that the policies also be deposited in the

bank in trust and we can see no reason why you should object to this procedure. As Mr. Lowry has stated, all that we care about is to be secured by the policies in event of fire for the amount which we are entitled to and we think that this is not unreasonable.

“It seems that Mr. Henderson had suggested when talking with Mr. Lowry while Mr. Lowry was in Missoula that the policies be placed with the bank as trustee, and we judge that you will probably arrange to handle the matter in this manner and that this will probably be explained to us at the time the draft is presented. We trust that you will wire us when you forward the draft, advising us in regard to the subject of the bill of sale and the insurance policies so we may be prepared for this when the draft is presented.

“It is certainly very unfortunate that this contract should have worked out in this manner and frankly I cannot understand just what is back of it all, as I had felt that we were on very friendly terms, indeed, and we have certainly done everything that we could to protect your interests and to conform to our share of the contract in every possible way. We have advertised your products quite extensively, have loaned you money aside from [276—170] the advance, have been very prompt with our advances in every respect, have given you the benefit of Mr. Juneau’s advice and suggestions which enabled you to get a great deal more out of your logs in the way of shop lumber

and selects than you could possibly have gotten operating as you were, and in fact have done everything that we could to make our connection with you to your advantage and profit as well as to our own.

“I would like nothing better than to be able to sit across the table from both of you and talk this matter out and see what the trouble is, but it is impossible for me to get away at the present time, due to the very urgent and strenuous financial conditions with which we are confronted at home. I plan, however, to get out there just as soon as conditions will permit and want to have a heart to heart, frank and above board talk with you at that time.

“In the meantime please let us have some information in regard to wishes reference to placing your stock on the market. We wrote you on October 30th and again on November 17th with reference to placing your stock on the market at competitive prices but have had no reply from you. It has been our policy throughout this contract of being guided by your wishes with reference to meeting market conditions and while we are very anxious indeed to get our money out of this contract as well as all of our other contracts, yet it has been our policy not to insist upon the mills meeting the present low level of prices unless they are willing to do so. This has meant an unreasonable strain on us and yet we have felt that as long as we could carry the mills, that we ought to give them the

benefit of this assistance rather than force them to liquidate their stock at the present low values.

“We would like to have you write us as completely as possible, [277—171] advising just what attitude you wish us to assume towards the subject of selling your stock at competitive prices and we will be guided accordingly.

“In closing * * *

Witness excused.

The Court then admitted in evidence, over the plaintiffs' objection, a writ of attachment issued out of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, in this action, directed to the Sheriff of Flathead County, Montana, dated December 20th, 1920, with the return endorsed thereon, as follows:

“I do hereby certify, That I received this Writ on the 20th day of December, A. D. 1920, and personally served the same by posting a copy thereof and also a copy of Notice of Attachment in the sawmill yard at Fletcher Spur on the 20th day of December, A. D. 1920, and levying upon and attaching the following described personal property, to wit:

“One million six hundred and fifteen thousand, seven hundred and eighty-six (1,615,786) feet of lumber, stacked and piled in the sawmill yard at Fletcher Spur, Flathead County, Montana, and which is marked or stenciled as follows, to wit: ‘Turner, Dennis & Lowry Lumber Company,’ and

placed J. E. Foss in charge as custodian, to serve without salary. * * * ”

Defendant rests. [278—172]

PLAINTIFFS' REBUTTAL.

Testimony of Ben W. Henderson, for Plaintiffs (Recalled in Rebuttal).

BEN W. HENDERSON, one of the plaintiffs, called as a witness in rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

I have seen the instrument, Defendant's Exhibit 1, which is a statement made up by Mr. Dennis, and which he called an account stated, at the office in Pablo. Mr. Dennis came and suggested that we go over our accounts and try to arrive at an understanding as to our account. At that time I told Mr. Dennis that I was very busy and I was not acquainted with the details of the bookkeeping and for him to go in and go over this account with Mr. Rapp, who would assist him with our books, as well as what data he had, and then when they had an account taken off I would come in and look it over and then decide, and I went in, and Mr. Dennis said he would explain it to me, and he started in and I didn't understand the explanation. "Well, now," he says, "it might be hard for you to see, though," he says, "I will explain it in a different manner." He did so and I thought possibly I understood what he meant—was not even sure then—but I said, "Now, Mr. Dennis, do I understand you to mean by that that you are charging us \$5.00 as a profit on this lumber that burned?" "Well," he says,

(Testimony of Ben W. Henderson.)

“yes, it means the same thing.” Well, I didn’t know what to say; I was taken by surprise, because I never had expected anything of the kind, when I had never figured any way except that they owned the lumber, and I didn’t understand how he charged us a profit on the lumber that was burned as theirs. Mr. Dennis at that time called my attention to the contract; he said, “Did you ever read your contract?” And I said, “I haven’t read it since it [279—173] was signed.” “Well,” he says, “you ought to get that contract and read it once and see what’s in it,” and he said, “read article 8 of your contract.” I read article 8 and read it the second time. I then said, “Mr. Dennis, I can readily see the construction that you are placing on this contract, but that was not my understanding of the contract at the time I signed it; I know it was not Mr. Donlan’s understanding of the contract, and I think I have pretty good proof that you knew that we didn’t understand it to mean that.” That is, being \$5 profit in case it burned; and I said, “That was in this way: you knew that we placed \$70,000 insurance on this or \$35 a thousand insurance on this lumber at the time that we bought it and if we had expected to pay a profit in case it burned we certainly would have covered it for the extra \$5 a thousand.” That, in substance, was what was said at that time. The last I saw of it, Mr. Dennis took the account and handed it to our bookkeeper, and says, “This is for your files.” As I remember it, that was the words. That was all that was said or done with reference to that.

(Testimony of Ben W. Henderson.)

The same day or prior thereto I had received a communication by telephone from Senator Donlan with reference to these notes that are sued on in this case, and I talked to Mr. Dennis with reference to that telephone conversation. I asked Mr. Dennis where those notes were. Mr. Donlan had telephoned me that he had given him \$60,000 to apply on those notes and that Mr. Dennis didn't have the notes with him, said they were in his grip at Polson, and that when he went up the following day he would deliver them to me. He held the notes up, or what I took to be the notes—I asked him where the notes were and he said “Here they are,” and he says, “I will deliver them to you when you pay this,” or something to that effect, or “when you [280—174] pay the balance,” or “when you pay this.” That is pay the amount detailed in Exhibit 1 of the defendant, the \$36,000. He refused to deliver the notes at that time and place.

There was no mistake on my part, as far as I know, in reference to drawing this contract. I had practically nothing to do with the drawing of the contract; of course I knew that they were dealing and entering into a deal, and Mr. Donlan did this and when the contract was drawn Mr. Donlan told me the contract was ready for the signatures, and asked me to go to Mr. Violette's office, that Mr. Dennis was there, and we could read it over and complete it. I did so, and when I arrived there were there Mr. Violette, Mr. Donlan and Mr.

(Testimony of Ben W. Henderson.)

Dennis, as I remember. There was nothing said by anyone as to the transfer of this property being for security for any advances or loans that were to be made by the defendant in the case. There was nothing said at that time by Mr. Dennis or anyone else that the plaintiffs herein were sustaining the loss and damage in case of fire to the property.

The \$60,000 insurance policy was taken out with the loss payable clause to the defendant omitted—simply an oversight. When I got the insurance I was a pretty busy man up there, and to tell the truth, when I felt we should have some more insurance, I asked Mr. Rapp, our bookkeeper, to communicate with the Inter-Insurance Exchange; we were placing all of our insurance after that time with them. I am not sure whether it was gotten by written application; I am not positive about that insurance, whether it was telephoned, but I believe that in that instance it was either phoned or wired, because as a rule when I decided we needed it, I wanted it always right away, and told him we had better not wait to write for it. At any rate, I overlooked that unintentionally. [281—175]

I have figured out how much lumber was in the yard there that belonged to us at the time of the fire, and how much belonged to the defendant, that was covered by this \$130,000 insurance. There was: old yard, lumber destroyed 2,013,522 feet, insurance received \$70,000, rate per thousand feet \$34.76½, lumber owned by defendant bill of sale 2,000,000 feet less shipments 284,035 feet, leaves a balance of

(Testimony of Ben W. Henderson.)

1,715,965 feet burned in the old yard belonging to defendant, insurance $\$34.76\frac{1}{2}$ per thousand is $\$59,655.50$. That is insurance due them on the old yard. Carrying out that proportion of the lumber owned by us and by them in the old yard, they would have $\$59,000$ plus and we would have $\$10,000$ plus, as our part of the insurance. Lumber owned by plaintiffs 297,557 feet, insurance $\$34.76\frac{1}{2}$ per thousand, our proportion of that was $\$10,344.50$.

In the new yard: lumber destroyed 1,932,676 feet, insurance received $\$60,000$, rate per thousand $\$31.04\frac{1}{2}$, lumber owned by defendant bill of sale 1,338,412 feet, insurance $\$31.04\frac{1}{2}$ per thousand $\$41,551.08$, lumber owned by plaintiffs 594,264 feet, insurance $\$31.04\frac{1}{2}$ per thousand $\$18,448.92$. The defendants were entitled under this to $\$41,551.08$ and the plaintiffs to $\$18,448.92$ of this $\$60,000$. I have carried out my computations in typewriting in a recapitulation here. Of the total insurance the defendant was entitled to claim $\$101,206.58$; the plaintiffs $\$28,793.42$; total insurance, $\$130,000$. I have carried this out in the computations on this sheet.

Plaintiffs' Exhibit 13, then admitted in evidence without objection, is as follows:

Plaintiffs' Exhibit No. 13.**PROOF OF LOSS AND APPORTIONMENT OF
INSURANCE. OLD YARD. [282—176]**

Lumber destroyed 2,013,522

Insurance received..... \$70,000.00

Rate per M ft..... \$34.765

Lumber owned by defendant:

Bill of sale.....2,000,000

Less shipments.....284,035..... 1,715,965

Insurance @ \$34.765 per M..... 59,655.50

Lumber owned by plaintiffs..... 297,557

Insurance @ \$34.765..... \$10,344.50

NEW YARD.

Lumber destroyed.....1,932,676

Insurance received..... \$60,000.00

Rate per M ft..... \$31.045

Lumber owned by defendant:

Bill of Sale..... 1,338,412

Insurance @ \$31.045 per M..... \$41,551.08

Lumber owned by plaintiffs:..... 594,264

Insurance @ 31.045..... \$18,448.92

RECAPITULATION OF BOTH YARDS.

Old Yard—Defendant 1,715,965 @ \$34.765.

..... \$59,655.50

New Yard " 1,338,412 @ 31.045.

..... 41,551.08

3,054,377 ft. \$101,206.58

Previously paid to defendants..... 60,000.00

Balance..... \$41,206.58

(Testimony of Ben W. Henderson.)

Old yard—Plaintiffs	297,557 @ \$34.765.	
.....		\$10,344.50
New Yard	594,264 @ 31.045.	
.....		18,448.92
Total	891,821 ft.	\$28,793.42
Defendants.....		\$101,206.58
Plaintiffs		28,793.42
		<hr/>
Total insurance.....		\$130,000.00

[283—177]

By the WITNESS.—In making this proof of loss to the insurance companies, introduced in evidence, the prices were fixed by Mr. Juneau, who was there representing Turner, Dennis & Lowry. The average price fixed by that is \$51.10, as I remember. I extended the prices throughout. There was nothing ever said to me by either the defendants or by Mr. Juneau, representing them, that they did not own this lumber.

I do not know anything about these demurrage charges of \$601 on the 11 cars that were shipped. I never had any conversation with Mr. Dennis, or any member of the firm, relative to what was testified to by Mr. Dennis, that it was customary for the seller to stand the demurrage, and in the second place that he had an agreement with Mr. Donlan and I, and had talked it over in my presence, and I had assented to paying that demurrage on these transit cars. We shipped our first cars along the latter part of July and the first expense account that we received was

(Testimony of Ben W. Henderson.)

right along Christmas; I couldn't tell the date, but the very last of December; the first expense bill we received was five or six months afterwards. That was the first information we had that these demurrage charges were being made against us. I never consented to it. I couldn't say whether they ever charged us any commission on these sales aside from the ones which are provided for in the contract; we have those statements which they sent us at that time. I do not know whether or not they were customary, as testified to by Mr. Dennis. I didn't expect to have to take care of any demurrage charges; that was my understanding.

When they made an advance on lumber or payment, we delivered a bill of sale to them, and when we borrowed money from them we gave a note. That method was carried on throughout our [284—178] entire transaction.

In the conversation I had with Mr. Dennis there along about the latter part of September or the first of October, when this Exhibit 1 of the defendant was made by him, he did not deny that the notes had been paid, when I told him they had. His refusal to surrender was simply based on the fact that I wouldn't acknowledge Exhibit 1 as the balance due.

We could have shipped around at least 35,000 a day on the equipment that we had there at that time. In 90 days that would have been 3,000,000 substantially. That was a single shift.

We couldn't carry the contract out on up to Jan-

(Testimony of Ben W. Henderson.)

uary 1st, 1921, because we got no orders; we received no orders from them to go ahead; we were ready at all times to ship this lumber; now, I don't know just what they are trying to get at; we didn't ship because we had no orders. They did not pay us for what we did ship; they turned down our November draft for \$13,999.44. They didn't honor our draft for that at that time. Then it ran on and they didn't order the next, or wouldn't issue a draft for the next stock. We made a draft on them, or Mr. Juneau did, for \$13,999.44, for November cut, and we gave them a bill of sale at that time; they kept the bill of sale and didn't make any payment of it; afterwards said they had credited our account with it. When the time came for the next advance they checked the yard and I refused to deliver the bill of sale to them until I had received the money, Mr. Juneau to sign the draft unless I gave him the bill of sale as we had been doing; I told him I would deposit this bill of sale in our bank in Missoula, with authority to deliver to them on receipt of the money—on receipt of payment for this; he refused, but said he would sign the draft if I would send the bill of sale on to the [285—179] Kansas City bank, which I refused to do.

Cross-examination by Mr. HALL.

They did not tell me at that time that they had placed that credit of \$13,999.44. I first learned of that when Mr. Lowry was here; he told us he had credited us with that. I told Mr. Parsons that the demurrage was to be paid by the defendant; in fact,

(Testimony of Ben W. Henderson.)

I never gave the demurrage any consideration. I did not understand that they were to pay the freight too. I didn't anticipate any demurrage.

As to whether they rendered an account of the sales as fast as they made them, I think on the first three cars, possibly, we got a record of that sale without much delay, but not the expense bill. They did make a report, Defendant's Exhibit 6, of that sale of car number 52100, to show there they paid \$231 demurrage, but we didn't receive this until the last of December, right around Christmas time; we got a sale report of all the cars; right around Christmas time we got those. I never made any objection of that to them.

I said that Mr. Juneau fixed the prices. It is a fact that what Mr. Juneau did he had the Weyerhauser list there and he said what the Weyerhauser list showed. If I may explain, we called Mr. Juneau and we wanted a man to arbitrate; that is, it was for us to make the proof of loss and we wanted some man who was better posted than ourselves on the price of lumber that day, and we asked him if he would come down from Polson and set those prices for us; that we didn't know what price to put on the lumber and he did, and I believe he took it from the Weyerhauser card; he read it off and Mr. Keith took it down. He took Mr. Juneau's figures as he gave them to him.

I made objection besides that I didn't understand this [286—180] \$5 a thousand when Mr. Dennis showed me what he claimed was the amount

(Testimony of Ben W. Henderson.)

we owed Turner, Dennis & Lowry. That was the first intimation I had that we were expected to pay that \$5 a thousand. That wasn't the first time I knew that \$5 a thousand was in the contract; I knew that there was a \$25 a thousand in the contract to be placed on them subject to their interest—as their interest might appear in the property; I knew that, which I supposed was to protect them, and the \$20 there, and any interest which might accrue from that, in case of fire; that was my understanding. That was on the old yard. I understood then that we were to carry this insurance policy at \$25 a thousand; I did not do that. As to whether I mentioned to the Inter-Insurance Exchange the fact that Turner, Dennis & Lowry had any interest at all, I will say he was familiar with the circumstances. I didn't have that in the policy or insure any insurance in their favor. As to why I said to Mr. Dennis, "Do I understand that you are charging me \$5 a thousand on this lumber?" if I knew it was in the contract at the time I signed it, I will say there were two reasons that I recall now. In the first place, I didn't understand, I didn't know my legal rights in the matter, and in the next place I didn't care to enter into any controversy until I had a chance to talk with Mr. Donlan. I said to Mr. Parsons that it wasn't my understanding or Mr. Donlan's at the time I signed the contract, that they were to have \$5 a thousand more than \$20. I didn't say that I didn't know who had suggested that article 8 in the con-

(Testimony of Ben W. Henderson.)

tract; I had nothing to do with the making of the contract.

As to the reason why I was \$35,000 underinsured, I recall that Mr. Daly, the representative of the Inter-Insurance Exchange, was there, a few days, I think, before the fire—not over a week before; he came around regularly to inspect the [287—181] yard, and he asked me to take out more insurance at that time, and told me I was underinsured, and I told him that I didn't think I would at that time, that we expected to take a little chance along with the rest of them, and couldn't give it all to them fellows, or something to that effect. I intended to take out some, but I was a little too late; I intended to take out more.

Redirect Examination by Mr. PARSONS.

At the time these price lists were made out by Mr. Juneau I had, in addition to the basic list, the monthly discount sheet. As to what I said to Mr. Dennis in regard to this \$5 profit, I told him, when he said that it was in effect \$5 a thousand, that that was not my understanding; I told him that I could see now, after reading this contract, the construction that he was endeavoring to place on it, but I assured him that it was not my understanding of the contract or the meaning of the contract at the time I signed it; I knew that it was not Mr. Donlan's understanding, and I thought I had proof that he knew that we did not understand it that way; that I did not understand that he was to be

(Testimony of Ben W. Henderson.)

paid a profit. If so, I would have insured for \$5 more a thousand.

Recross-examination by Mr. HALL.

The policies will show how long we had them in our possession before the fire; those policies were kept in the bank here in Missoula, the Missoula Trust & Savings Bank; they were in there at the time of the fire. We had got them back quite a long time before the fire. We had them in our possession; they were in the bank.

Witness excused. [288—182]

Testimony of Ed. Donlan, for Plaintiffs (Recalled in Rebuttal).

ED. DONLAN, one of the plaintiffs, called as a witness in rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

I testified before. I heard the testimony of Mr. Dennis with reference to making this contract, and the circumstances under which it was executed. I never spoke to Mr. Dennis about the contract until the morning of the 14th of April, 1920. I met Mr. Dennis in the latter part of January or the first of February at the Florence Hotel, the first time I met him and the only time I met him until the 14th of April. I met Mr. Juneau and Mr. Juneau knew I had an option from Smead on this lumber; Mr. Juneau had been up around Pablo for practically six or eight months, and he came to me and wanted to know what I was going to do with it along the early part of April. I told him that

(Testimony of Ed. Donlan.)

I had an option with a party in Spokane on a flat price of \$44—I don't know whether I told him that price, but that is what I had, and I couldn't do anything until it was up, on the 10th, I believe. Mr. Juneau came to Missoula about the 10th or before that, and I told him to get in touch with Mr. Dennis and see if they wanted this lumber, and he wired Mr. Dennis, who said he was coming to Missoula.

I met Mr. Dennis on the morning of the 14th. Mr. Juneau had made arrangements and they came to the Palace Hotel. I went up into a room there and he says, "Well now, what about this contract, this sale?" I said, "I want to sell this lumber and I want a mill—the mill run for the lumber in the yard, and what we are to cut up to January 21st, 1921, and I want \$42 a thousand." He says, "No, I won't deal that way; I won't deal on a flat price." The man convinced me; he says, "We will buy this lumber, but I will buy it this way, that we will pay— [289—183] we will go out and get the highest market price, and take 15% of it for the selling of it, and we can get you a great deal more money; you are very foolish; this is a better deal for you than selling on a flat price of \$42," and he convinced me in a short time that I thought he was right, that we would get more money, and I told him what I wanted, that the option was up on the Smead contract to-morrow, on the 15th, and that I had to pay \$60,000, and I stated there were 2,000,000 feet or over in the yard

(Testimony of Ed. Donlan.)

there, and I wanted an advance of \$30 a thousand, and \$20 a thousand on the—what we were to cut from there on to January 1st, 1921. He said, “No, I won’t advance \$30 a thousand, but I will advance \$20 a thousand on this and loan you \$20 a thousand, each, making \$60,000; but,” he says, “I have got to take this up with my people in Kansas City. I will wire them your proposition, but I want to look at this lumber first; now, how can we go out there?” When we got through the negotiations there I hired an automobile and sent him and Mr. Juneau to the mill and brought them back that night. The next morning he was well satisfied with the lumber and he got a wire from Kansas City office and said, “It is all right; we will make the deal.” I said, “We will go up to Mr. Violette’s office,” which we did, and I told Mr. Violette we wanted a contract drawn for the Smead yard, the lumber that was in there and what we were to cut between now and January, and Mr. Violette took a piece of tablet and sat down at the table. I told part of it and Mr. Dennis told part of how the sale was to be consummated, and Mr. Violette wrote it out in long-hand, took down the notes of what each one suggested, and then we were to come back after lunch. We did so, and Mr. Violette had it all revamped in a contract form, in pencil, and was typewriting it on the typewriter, and had possibly half a sheet typewritten. Mr. Violette [290—184] read this writing off the tablet, and then read what he had

(Testimony of Ed. Donlan.)

written on the typewriter. I don't remember any change made then. Then I went down and Mr. Dennis and Mr. Juneau and I went to the bank, and Mr. Dennis paid over the money, \$60,000; consummated that afternoon my deal with Mr. Dennis.

That night I called up Mr. Schlick and made an appointment with him to meet me at nine o'clock at his office to put insurance on it, and put insurance on it of \$70,000, made the policies out according to our agreement of the contract—\$25 or as their interests may appear—for \$70,000. The next morning we went out and I got Mr. Henderson, who came in there, and Mr. Juneau and Mr. Dennis and myself in Mr. Violette's office, and it was the first time Henderson had seen the contract, the first he had any negotiations about the contract; he read it over; Mr. Dennis took a copy of it, and I didn't read it over because I had read it before and knew what was in it. I said then, "Henderson, you sign it, as you sign all the checks and do the business up there; you sign the firm's name, Donlan & Henderson, by yourself." Mr. Dennis signed and got up and finally Mr. Dennis complimented Mr. Violette on the contract, and said, "This is fine; we got along here dandy," and we went down then to the bank and we gave out two ten thousand dollar notes, and on the money that we got the day before, and the transaction was closed, and that was the last I

(Testimony of Ed. Donlan.)

have seen of Mr. Dennis, I believe, until I met him in Chicago.

The only time I ever remember meeting Mr. Dennis was the latter part of January or the first of February, at the Florence Hotel. I heard his testimony. Nothing was ever said by him that this contract, these bills of sale given under the contract and in pursuance of it, were to be only in the nature of a security. Nothing was ever said that we ourselves were to [291—185] stand the loss in case of fire. These bills of sale were given because Mr. Dennis insisted, was very insistent about that provision in the contract when it was drawn. I don't know whether anybody mentioned that the words vendors or vendees ought to be put in, but it was entirely satisfactory when Mr. Violette read over the first draft of the contract—no objections then offered—none, as far as I know. The contract contains the vendor's lien clause which was put in at Mr. Violette's suggestion.

After we were discussing the contract the morning of the 15th when he was taking down the notes, he says, "Now, I think that Donlan & Henderson ought to have a vendor's lien, as you are getting absolute possession; they are giving you a bill of sale, lease of the ground and absolute possession of this lumber; they ought to have a vendor's lien for the balance due them." Mr. Dennis says, "Why certainly, certainly it is all right."

This clause 8, the \$25 clause, was put in there at Mr. Dennis' instance. I don't remember any

(Testimony of Ed. Donlan.)

such conversation as that I objected to giving him title and giving protection to the lumber first, because I couldn't trust them with the title to the property sold, and second, because we might not get the best price for it; there is nothing to that at all. This money was paid by Mr. Dennis before the contract was signed; it was paid on the 15th. Mr. Dennis did not tell Mr. Violette there, or me, that he was not to take title, but simply on a factor's or commission basis or agency contract; he never mentioned that and there was no understanding. It was a contract from the start and he understood it and I understood it, that it was a sale, because I wanted a sale and to make the sale at a flat price first, and it was a sale of the lumber and he said, [292—186] "I will buy it under those terms." There is absolutely no mistake in that contract, as far as I am concerned. The draft for the \$60,000 was drawn before the contract was signed.

In my conversation with Mr. Dennis in Chicago there was nothing mentioned along the line that I agreed to the demurrage charges, or in which I was in favor of shipping on consignments. Nothing was mentioned along that line at any place. I told Mr. Dennis in Chicago why I wanted more money, what I called him up for. I wired Mr. Dennis from New York to Kansas City that I would be in Chicago on Tuesday evening and wanted to know if he would meet me there, or

(Testimony of Ed. Donlan.)

when, and to wire me at the Great Northern Hotel. When I got there Tuesday night I got a wire from Turner, Dennis & Lowry that I would find their man Dennis at the Congress Hotel. I called there that evening about four or five o'clock; Mr. Dennis was out, but I got him later in the evening, and made an appointment for the next morning to come over to the Great Northern Hotel, and I told him what I wanted. I wanted \$25,000 and I told him the reason I wanted it was our payments were bigger and we had no orders and no lumber shipped and we had no orders for lumber when I left the early part of June. He said, "Well, I can't." I said, "I would like to get an advance of the full \$20 a thousand now on what lumber we have, and then loan me the money to make up \$25,000." So he said. "I will wire Mr. Juneau to go down there and check this up and then meet you," and he at that time said, "Now, I am—we are dividing our territory up; Mr. Turner is taking the Eastern district, New York, New England states; I am taking this and somebody else there, and we are perfecting our organization, and we will move this lumber out." And nothing was said about demurrage or anything else at that time.

I told him at that time we had no orders and no money coming [293—187] in on the lumber in the yard that was dry and should be shipped, and he said they were going to get the orders and they

(Testimony of Ed. Donlan.)

were getting their organization lined up in such shape that they would, and I think at that time I gave him the name of a man in New York that wanted to buy lumber, that I had met at that time; I know we talked of it and he was to notify or turn it over to Mr. Turner. I never consented or agreed to these transit orders made, and I didn't know there was going to be any transit orders until I went up to the mill at Pablo some time in July and found out that these transit orders with no prices fixed, and I told Henderson it was wrong and should not be shipped. I wouldn't give my assent to transit orders because you couldn't tell where they were going, and you didn't know what you were going to get for it; they might be on the road for months, which they were. I think we had four or five of those orders; I really don't know.

I had to do with taking out the first of these insurance policies for \$70,000. That was taken out with the name of the defendant in there, as their interest might appear. I didn't have anything to do with taking out the subsequent insurance of \$60,000. I don't know how that was done; all I know I have asked Mr. Henderson at different times if he was keeping himself protected, but I have no first hand information at all. There was no disposition on my part to deny and I never denied that the defendant in this case was entitled to that pro rata insurance, to cover that

(Testimony of Ed. Donlan.)

portion of the lumber covered by their bill of sale.

As to the telegram, Defendant's Exhibit 3, in which it speaks of a \$20,000 payment that hadn't arrived but as soon as it did I would forward it, I didn't do that because I wasn't here, and afterwards the draft come to Mr. Henderson and he just [294—188] put it in the bank here to his credit, so that wasn't ever paid. I had a telephone from Mr. Juneau and a wire from Mr. Dennis asking for this, saying that it had left, I believe, and I know I hadn't received it for it hadn't come to the bank.

These notes that we gave the defendant in the case were paid by us. They were paid on September 29th. Mr. Schlick notified us that there was \$10,000 there on the \$70,000 of insurance, and that the rest would be there along in a day or so, or there was one policy—I forget just—but anyway the money was paid and the insurance. I came in here and along about, I think, the 17th or 18th of September, from my operations on the Jocko, and met Mr. Schlick, and he said that the money was in the bank. Mr. Dennis and Mr. Juneau drove in here from Camas Hot Springs on the night of the 28th, the next morning, the morning of the 29th, we went up to the bank and we had to sign the policies; he signed them and I signed them for Donlan & Henderson; Mr. Keith gave us a draft for \$60,000. "Now," I said, "this pays our notes

(Testimony of Ed. Donlan.)

in addition to—and,” I said, “where is the notes?” He says, “They are up in my grip at Polson in the hotel; we are going up now as soon as we get through with this transaction, we are going back up there, and I will be down to see Henderson, and I will bring the notes down either this evening or tomorrow and turn them over to Mr. Henderson.” We never got those notes back, and I telephoned Mr. Henderson that day the results of my conference with Mr. Dennis, that I had paid him this money and that he was to deliver the notes to Henderson when he came down there. This \$60,000 was paid on September 29th.

I was in the lumber business also with Hoyt; we had a small cut there. That lumber wasn't nearly as good lumber as we manufactured here; it was smaller and shorter, more limbs; [295—189] when we took that over the mill was defunct; we took it over from the bank down here, and there were six or seven hundred thousand feet of them logs cut and they were stained at that time, and the cut as a general proposition a'n't nearly as good a stand of timber as what Donlan & Henderson had. I sold that for \$23 in the yard, and the Bradford-Kennedy had to haul that six and a half or six miles, and then we put it through a planer under a contract of \$3.50, making \$26.50 a thousand.

We didn't complete our contract to the first of the year because they hadn't paid us in full according to the terms of the contract; in the first place, we

(Testimony of Ed. Donlan.)

were to draw on them for the lumber shipped, and we drew on them and they told us not to draw on them any more, and they had never made a remittance on lumber that was shipped in July, except what we drew on them, and then they turned our draft down, and the October cut, and they wouldn't sign a draft unless Mr. Henderson would sign a bill of sale and send it to a Kansas City bank. They never paid us anything for this lumber that was burned.

I heard Mr. Lowry testify here that he had a conversation with me. Mr. Lowry came in here and I believe I met him in Violette's office—I don't know—yes, Mr. Juneau was along—in the morning, and got to talking about a settlement, and he wanted a statement of something, and Mr. Keith and Mr. Henderson and Mr. Violette were all there, and it was agreed we would work out a way on a settlement, and he was demanding the insurance money from us, and told us then that they had credited up this thirteen or fourteen thousand dollar draft that they turned down; that was \$13,999.44. He told us that morning that they had given us credit back there on the advance. So Mr. Keith went to work and got up a statement, see if there couldn't be any arrangements made of the difference, and we [296—190] were to find out how our books should compare with Mr. Lowry's. They were to meet that afternoon, Mr. Keith was, and I went back to my operation up on the Jocko, where I was building a railroad, and I told Mr. Violette to go down with

(Testimony of Ed. Donlan.)

Mr. Henderson and meet Mr. Lowry that night at the Florence Hotel, and he would represent me. They didn't come to any terms down there, as I know, or anything. The next morning Mr. Keith came back and Mr. Henderson went up to Pablo, and Mr. Keith told me that Mr. Lowry was very disappointed. * * * That was the last of it that time until the following night, and then Mr. Lowry was wanting to meet me the next night, and that he was waiting over there, and that I should go into Missoula and meet him. I came into Missoula that night and I went up to Mr. Violette's office and called Mr. Lowry at the Florence Hotel, and I said, "I'm up here at Mr.—you want to see me?" And I said, "I'm here at Mr. Violette's office and will you come up here?" "Well," he said, "I don't like to go into a lawyers office." "Well," I said, "you either come here or I will go down there; but if I go I will take Mr. Violette with me." "Well, then," he said, "I will go up there." So he came up there, and I had got the proposition that he had put up the night before, on a basis that this \$5 a thousand profit, that they were asking for on the burnt lumber, as an arbitration provided by some association of lumbermen back there in Kansas City, or Missouri, some of those lumber associations, retail companies or wholesale, I don't know which—but they were backing him there to adjust this difference, and I said to Mr. Lowry, "The first thing I want to tell you now is that I will never pay the \$5 a thousand profit; I will never stand for arbitration, and if we

(Testimony of Ed. Donlan.)

can, this other difference, if we can get the money I might undertake to do that; I have already wired to see whether I can [297—191] get some money; I will talk then, if I can get it; I will see then if we can make a settlement on that." He says, "Well, I don't want to come back here." I said, "There is no need to come back here; Mr. Violette or someone—we can settle over there, whatever you want to do." He said, "I want to go to Spokane; I got to go," he says, "I am going to-night." I said, "All right, you let me know." I told him I would let him know on Saturday.

I never made out the statement of the balance due between us two. I signed these proofs of loss, exhibits in this case.

Cross-examination by Mr. HALL.

In that talk with Mr. Lowry I did not see this statement that he had, showing that we were indebted to him in the sum of forty-four hundred and some odd dollars, exclusive of the insurance. I did not see the statement in which our auditor, Mr. Keith—the lead pencil statement here—in which he shows that, not taking into consideration the insurance, our firm was indebted to Turner, Dennis & Lowry in the sum of \$1100. Mr. Keith told me that. He didn't tell me that at that time up there; he just told me without any discussion or anything that was about the way it would stand.

My relations with Mr. Violette were nothing more than that Mr. Violette had done a little business for me, looking after my ranch down here at French-

(Testimony of Ed. Donlan.)

town or something like that, and looking after taxes and that kind of stuff. He has not been in my employ at all; if I have something to do along those lines I go up and see Mr. Violette to do it, and then he puts in a bill. He does not keep any books for me. When we came to draw this contract I went to Mr. Violette because I was in the habit of doing business with him; I went to Mr. Violette [298—192] for more than that; Mr. Violette, I always considered him as safe, and would attend to it, and had the time, and would take the time, and do it.

When I talked with Mr. Dennis about what our agreement was to be, I didn't object to this \$25 a thousand insurance. I knew Mr. Violette had put that in the contract. I first objected to that when they came in and demanded \$5 a thousand profit after we losing the lumber, after sustaining our loss, they demanding their profit before we were getting anything. It would be all right if they paid us for the lumber in the first place and then took their profit; I wouldn't have objected to it. I understood every part of that contract fully.

We had the policies from the Inter-Insurance Exchange in Keith's bank; all the policies were put in there; Mr. Henderson put them there. My understanding they were the same as the other policies when they were issued; they were there, only the time after the adjustment we had to sign them and take the policies up to be turned over at the time of the adjustment.

I said to the Court that when this agreement was

(Testimony of Ed. Donlan.)

made between myself and Mr. Dennis I made him a proposition to buy this lumber at a flat price, and he refused to do it. He said he would make me a lot more money on the basis of advancing me \$20 a thousand and then selling the lumber for the highest market price, retaining 15% as his commission for selling it, taking out the \$20 a thousand that he had advanced me, and the expenses, and turning the balance over to me, than on a flat price. As to whether I agreed that he was to do that—he bought the lumber, and would take as his profit 15%, that he was to advance me \$20 a thousand, then sell the lumber, take out the cost of the lumber, take out his 15% and the 2% discount, and the balance was to go to me; I will say that [299—193] the agreement was just as I understood—was just as the contract states it.

I did not tell Mr. Parsons that I did not know about this consignment business. I objected to it; I meant I would find out about it. I do not know that Defendant's Exhibits 23 and 24 were sent by our firm. I first knew that they were sending cars on consignment some time in July, and that was being done by Henderson.

Defendant's Exhibit 23, then admitted in evidence without objection, is a Western Union telegram, dated Aug. 3, 1920, from Donlan & Henderson to the defendant, reading as follows:

(Testimony of Ed. Donlan.)

Defendant's Exhibit No. 23.

“Loading Item Number One in Car U P 10896
Second Car On Order T-701 G In Car Penna 558814
And Order Your Wire Of Fifth Date In Car U P
78654 All Western Pine.”

Defendant's Exhibit 24, then admitted in evidence without objection, is a Western Union telegram dated Aug. 6, 1920, from Donlan & Henderson to the defendant, reading:

Defendant's Exhibit No. 24.

“Disregard our wire shipping advice of August third except order 1 seven naught one G shipped car Pennsylvania Five Five Eight Eight One Four have loaded car U P Seven eight six five four approximately twenty-five thousand feet four inch and wider number three S two S food assortment of widths and lengths four thousand feet number two eight inch shiplap three thousand feet four inch and wider selects S two S two thousand feet S four S selects wire immediately shipping instructions.”

By the WITNESS.—He had been sending them out that way on consignment, but [300—194] I objected to it. I didn't know it up to that time, and this order was in and was accepted by him when I was up there. By him, I mean Mr. Henderson.

Redirect Examination by Mr. PARSONS.

By saying that I wouldn't object if he had paid us for our lumber first and then taken out their profit, I meant taking the \$5 a thousand—taken

(Testimony of A. J. Violette.)

his profit of \$5 a thousand out of the lumber that burnt. I mean if he paid us for the lumber burned we wouldn't care how much he deducted.

Witness excused.

Testimony of A. J. Violette, for Plaintiffs (In Rebuttal).

A. J. VIOLETTE, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is A. J. Violette; I am an attorney at law and have practiced since 1895. So far as professional relations are concerned, I have been doing some work for the firm of Donlan & Henderson off and on, drawing contracts, and brought one or two suits that were never tried.

I know Mr. Dennis; I first met Mr. Dennis on or about the 15th of April, 1920. It was around nine o'clock in the morning when I got to my office; they either got to my office before I did or I got there shortly afterwards; at any rate he was with Senator Donlan and Mr. Juneau; they came to my office and I think it was Mr. Donlan spoke up—I wouldn't be sure of that, but that would be my best recollection. He says, "We want you to draw a contract for us," and I says, "All right," got out a tablet or some loose leaves there that I had in a [301—195] tablet, and proceeded to get the terms of this contract. The terms were given to me by Mr. Dennis on behalf of the Turner, Dennis & Lowry

(Testimony of A. J. Violette.)

Lumber Company, and some suggestions, probably, from Senator Donlan, and I took those down on notes, and when that was done I told them it would take me some time to go over this contract, as I wanted to prepare it carefully, and that they should come in the afternoon, and if I had it ready they could sign it then, and if I didn't they would have to wait until the next morning, and, as I say, I took the specifications from the contract they wanted drawn, and they afterward returned and came back in the afternoon. I had it written out in longhand entirely and had it partly typewritten. I was writing it—had no stenographer—and was typewriting it myself. So we went over the contract; it was read then by Mr. Donlan and Mr. Dennis, and I read it very likely for the benefit of both of them—it was my own typewriting—and also showed them what I had already typewritten, and I told them that very likely I would finish it that evening and it could be signed the first thing in the morning. The next morning they came back, the same parties along with Mr. Henderson; they took the contract and read it over carefully; I don't know if Mr. Dennis read it over; it is my recollection that Mr. Juneau read a copy; I had it in triplicate; he read the other copy, and I think he turned over the extra copy to Mr. Henderson; at any rate I know he had read it over carefully, because he had been there once before, and the contract was then and there agreed on, and this particular bill of sale was in the

(Testimony of A. J. Violette.)

contract for 2,000,000 feet sold out of Smead's yard, and that was signed.

The first bill of sale of even date with the contract, conveying 2,000,000 feet from the old Smead yard, both have a [302—196] vendor's lien, reserving to the grantors and vendors, because Mr. Dennis emphasized in speaking of this contract certain features of it, the feature of the proposition of delivery and that the title should pass, and after I noted that down I suggested that inasmuch as they were getting complete possession of title to this property it would probably be wise for Donlan & Henderson to have a vendor's lien for the balance of the purchase price, and Mr. Dennis readily agreed to it; and so it was put there that way and inserted in the contract, tending to preserve a vendor's lien as between these parties; and then I incorporated the same thing in the bill of sale except in that instance I made it as short as I could, and I referred to it as vendor's lien, and used that again in the bill of sale, and reserving a vendor's lien, whereas in the contract I stated more at length having the same effect, and that is the reason it was put there; it was consented to by Mr. Dennis. Nothing was said to me or in my presence by Mr. Dennis or anyone else about this bill of sale being merely a matter of security, a mortgage for money. Nothing was said at that time that the plaintiffs should stand the loss in case any fire should occur; the only provision raised to the insurance was this provision and I never discussed that; I put that in

(Testimony of A. J. Violette.)

there just the way as they told me and I think there was no discussion at all. I carried out absolutely what I understood to be their contract. After the contract was finished Mr. Dennis was thoroughly satisfied with it, fully satisfied, left the office in very good spirits, said the contract was very well drawn, in fact complimented me on drawing the contract, stated that he had been drawing contracts himself and it was a much better contract than he had been drawing himself. He didn't state how he had been drawing these contracts, but he said this was preferable [303—197] to the ones he used to draw; that is, in the way it was set out.

There was no effort on my part to take advantage of either party in behalf of the other in drafting this contract; I never did discuss the features; I let them dictate their own terms; I wasn't making the contract; I was simply carrying out what they told me, and the only suggestion was about the vendor's lien. Mr. Dennis emphasized the matters in regard to title, that he wanted the title to pass, and that's the reason he wanted incorporated in there that we should sublease or assign our leases to him, of the land on which this lumber existed, and as I understood that—we discussed the matter of those leases, and found out that part of the land and not all of it was simply under a verbal lease which was about to expire; my first impression was to get the lease and make a transfer, and found that couldn't be done, so I put a provision, a paragraph by itself, that this contract was an assignment, a lease, but

(Testimony of A. J. Violette.)

I put another provision that of course the plaintiffs in this action would have the use of this for the purpose of carrying out this contract; I still reserved a little right in the leased land for them so they could carry out the contract.

The clause in the contract that provides that in case of a failure of the parties to carry out their portion, the defendant should have the right to use the machinery or the planer, was suggested by the parties—I wouldn't say which it was, Mr. Dennis or Mr. Donlan—it was gone over and incidentally put in the contract, and I put it there as I understood it. The question concerning the right of possession of the property and delivery of the property arose in the same way as these matters concerning the title that I have just testified to. Those all arose at the special instance of Mr. Dennis; he [304—198] was very emphatic about those points, about the possession and delivery and ownership, and those bills of sale, and the assignment of the lease; those four features he was emphatic and he outlined it—the assignment of the leases, the delivery, possession and title and the bills of sale; they were all carried out as he wanted them.

I was later present at a conversation had between Mr. Lowry and Mr. Donlan, with reference to their business. The first time Mr. Lowry came to town it is my impression he came to my office with Mr. Donlan, and I think possibly Mr. Juneau was present, with reference to compromising or settling this whole difficulty, and he had prepared at that time

(Testimony of A. J. Violette.)

a statement that he had gotten from Mr. Dennis, I think, and he suggested that Mr. Keith and I figure out the financial transactions between these parties. Well, it would take some time to do that, so in the afternoon Mr. Keith and I did figure out the financial transactions with reference to this contract, including not only the subject matter of the first cause of action in this complaint, but the whole transaction, including this whole contract, up to that time, including advancements made after the fire for lumber in the yard; so we started to complete that and as Mr. Lowry stated it was delayed and took longer than we figured; in fact, we didn't get time to even figure the interest, so we were to meet again, and it was postponed until we could get that statement out, and that didn't occur until some time that evening, and that evening I went to the Florence Hotel with Mr. Keith and Mr. Henderson; Mr. Donlan was in the meantime called out of town and went back to his project on the Jocko; and we met with Mr. Lowry that night and discussed those figures. [305—199]

The next meeting was the meeting held at my office before Mr. Lowry left in the evening, just shortly before train time, in which Mr. Donlan called him from my office, and Mr. Lowry came up, and I think likely he had this statement we had prepared with him at that time, although I don't remember that statement was discussed; but at the meeting at the Florence Hotel there were two

(Testimony of A. J. Violette.)

propositions made, one for arbitration, as Mr. Lowry had suggested that this matter might be arbitrated if they couldn't agree—that is, the matter of the \$5 insurance they wanted to arbitrate—and Mr. Henderson told him he would have to consult Mr. Donlan. That was one of the propositions, and also the proposition as to what stand they would take on the \$5 insurance they were claiming; so that was the two principal matters of discussion between Mr. Lowry and Mr. Donlan in my office that night, and in fact they were there a very short time; Mr. Lowry wanted to take a train and was in a hurry, but Mr. Donlan told him that as to the proposition of the \$5 bonus of insurance he would never consent to pay, and that he wouldn't submit the question to arbitration under any circumstances; that was the first thing that was settled in that conversation. Then Mr. Lowry made Mr. Donlan a tentative proposition to this effect, that if they did arbitrate the \$5 a thousand, that when Donlan & Henderson paid in cash the balance which they claimed, being in the neighborhood of \$36,000, and, as I say, included the transactions since the fire—there was \$18,000 paid there. Mr. Donlan then told him this, that he had wired for money, that he would possibly hear from that in two or three days or so, and told him that when he got an answer from that he would let him know; but he says, “I want it distinctly under-

(Testimony of A. J. Violette.)

stood, Mr. Lowry, that I am not accepting your proposition to compromise by telegraphing for this money; if I do get the money I will take it up with you, or I may not, but [306—200] I am not accepting your proposition.” I didn’t understand Mr. Lowry to make a definite proposition either; he said he was making a tentative proposition, if we would do so and so will you do so and so, and Mr. Donlan said simply, “I have wired for money, but I don’t want this to be construed,” or words to that effect, “that this is an acceptance of this proposition, but I will take it up with you.” In the course of that conversation Mr. Donlan suggested that if this proposition was taken up after he got his advice from the east on this money, that Mr. Henderson might go to Spokane to settle this thing with him, and he would not have to go back. He shook hands, we all shook hands, and Mr. Lowry went out to take his train. That is the best of my recollection of what happened.

Cross-examination by Mr. HALL.

I don’t know whether Mr. Lowry said at that time to Mr. Donlan that in their business whenever they had any misunderstanding or disputes with their people it was their custom to withdraw and “you give us back what money we are in here and we will withdraw and quit”; I know Mr. Lowry wanted to do that. He said, “Return us the money that we have put into this proposition and we will withdraw and let you contract with

(Testimony of A. J. Violette.)

somebody else"; that is what he wanted done; he wanted to settle the whole proposition and be released for this contract entirely. I think he mentioned Mr. Dennis too, because he wasn't here when this contract was made; I think he made the suggestion, "if there is any dispute over that part of it I will go back home and send Tom Dennis out here to settle with you."

I don't *know suggested* about figuring up this statement that Mr. Keith made; the suggestion was made by the parties there; it was simply a question of figuring what money, the [307—201] financial transactions between the parties; that is what I understood, as to the arrangement they had with the others, and Mr. Lowry, I think, had the copy that Mr. Dennis had presented to Mr. Henderson. Senator Donlan wasn't there that night; we adjourned in the afternoon; he had to go back on the Jocko and left that afternoon while we were figuring on the statement. He went to Arlee.

Witness excused.

Testimony of Frank P. Gray, for Plaintiffs (In Rebuttal).

FRANK P. GRAY, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Frank P. Gray; I live at Polson, and am in the hotel business there; I have been

(Testimony of Frank P. Gray.)

there sixteen years. I was there in September of last year, 1920. I keep a register at my hotel. I know that Thomas S. Dennis was there in September, 1920. Looking at the hotel register of September 24th, I see that he is registered there on that date at my hotel. Mrs. Dennis and Mr. Juneau were with him. I know personally that he was there at that time.

Witness excused.

Testimony of Welling Rapp, for Plaintiffs (In Rebuttal).

WELLING RAPP, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Welling Rapp; my business is that of bookkeeper for Donlan & Henderson; I was there about a year. I was [308—202] there the latter part of September, 1920, when Mr. Dennis prepared and submitted to Mr. Henderson his Exhibit No. 1 in this case, wherein is shown to be, according to Mr. Dennis' figures, a balance of about \$36,000 due from plaintiffs to defendant. Mr. Dennis came in the office and desired to check over the accounts in order to make up a statement of how they stood, and he took our books and compared a good many instances, and in a good many instances there were items that I didn't

(Testimony of Welling Rapp.)

have—their freight items I didn't have a record of—and in that way Mr. Dennis made out a statement; and after we were through he asked me if I wanted Mr. Henderson to see it and I said yes, and I called Mr. Henderson and he looked over the statement. There was no agreement made between them there that day that it was accurate and correct. After the statement was returned to Mr. Dennis it was handed to me, but there was a discussion about a certain part of that statement. He handed it to me and said, "This will be your record," in substance to that.

Mr. Henderson there asked for some notes that Mr. Dennis had; it was some notes that had been paid in Missoula here, and Mr. Dennis said he had the notes and took them in his hand and held them up and said that he would turn those notes over to Mr. Henderson when this was settled—that is, the statement that was there. Mr. Dennis said to Mr. Henderson, after holding the notes up, "I will give you these when this," Exhibit 1, we will call it, "is settled," that statement that was made out at that time, and the one that he told me to keep for my record.

I remember the time the report was made to the insurance companies, fixing up the proofs of loss. Mr. Juneau figured and fixed the prices at that time, and Mr. Keith assisted him [309—203] in doing so; I was there, in and out.

(Testimony of Welling Rapp.)

I know how this insurance amounting to \$60,000 was placed on the yard; it was in several different policies and they were requested for that insurance from time to time; as the increase was taken up we wired in; that is, the message was telephoned to Missoula. I did the telephoning and made the arrangements for the insurance. As to how it happened that the name of the defendant in this case was not inserted in them, I had no instructions to that effect; that is, nothing was said. I just took out the insurance from time to time as I thought it was necessary; I had no instructions, one way or the other, in regard to it. I telephoned from the mill office to Missoula and then I would follow it up by letter; we had no telegraph office down there; I wrote the letter the same as I transmitted the message, without any instructions, specific instructions.

I remember a controversy arising there between Mr. Dennis and Mr. Henderson with regard to a \$5 item; that was one part of that statement that I knew nothing about and apparently Mr. Henderson didn't; he asked Mr. Dennis about it and Mr. Dennis referred him to the contract, and asked him if he ever did read his contract, and Mr. Henderson asked me to get the contract from the safe, which I did, and he either read it or I read it, I don't remember which, and Mr. Henderson stated that he could understand how such an interpreta-

(Testimony of Welling Rapp.)

tion or construction might be put on some certain clause—I don't remember which—but it was regarding the additional \$5 that is spoken of in this trial.

Cross-examination by Mr. HALL.

He said that was the first time he knew that was there. [310—204] And he was surprised when Mr. Dennis said it was there and he was expected to pay it. As I remember, I ordered all the insurance I ordered from Missoula; I telephoned it to Missoula. That was to the Inter Insurance Exchange; it was to the Western Union; you see, we had no telegraph office; I telephoned my telegram.

Redirect Examination by Mr. PARSONS.

I got the insurance through Mr. Daly, at Spokane. I telephoned my message here to the Western Union and they telegraphed to Mr. Daly at Spokane.

Witness excused.

Testimony of R. R. Hoyt, for Plaintiffs (In Rebuttal).

R. R. HOYT, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is R. R. Hoyt; I am in the lumber business, and sold some lumber to the Bradford-Ken-

(Testimony of R. R. Hoyt.)

nedy people last year. This lumber was located about five and a half miles southeast of Pablo. I was a partner of Senator Donlan. I am acquainted with the character of lumber, both in our yard, that was sold, and the character of the lumber that was in the Donlan & Henderson yard that was burned. I am not familiar with the lumber in the yard. As to whether there was any difference in the character of the timber from which the lumber was cut that we sold to the Bradford-Kennedy people, and the character of timber from which was cut the lumber in the Donlan & Henderson yard, I will say when we bought this stumpage the logs, there were about six or seven hundred thousand which was old logs scattered [311—205] in the woods, and they were badly stained and wouldn't make good lumber. The lumber manufactured from that would be stained lumber. Altogether we sold five million feet to Bradford-Kennedy, of sawed lumber.

Cross-examination by Mr. POPE.

The total contract covered five million feet; this six or seven hundred thousand was stained; that is, the logs cut in the woods there, about six or seven hundred thousand.

Redirect Examination by Mr. PARSONS.

As to how the logs we sawed up compared with the logs of Donlan & Henderson, for the timber,

(Testimony of R. R. Hoyt.)

the nature of the timber, that is, comparing the timber, I would say the timber below was better quality of lumber than my timber; my timber was more short and scrubby; their timber was down in the creek, and five or six log trees, while mine was short and couldn't make the lumber.

Recross-examination by Mr. POPE.

In other words, theirs were larger logs, better grade of stuff; it would cut out better and be better quality of stuff.

Witness excused.

Testimony of I. R. Keith, for Plaintiffs (In Rebuttal).

I. R. KEITH, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Irnie Keith; I am bookkeeper for Mr. Donlan, and have been with Mr. Donlan 18 or 20 years. I was there at [312—206] Donlan & Henderson's camp at Pablo, in 1920. I priced the proofs of loss to the insurance companies after the fire on August 3d, 1920, from figures given me by Mr. Juneau. The prices were given me by Mr. Juneau from this price list. That was gotten out by the Western Pine Manufacturers Association, current price list of western pine and Idaho white pine. I have a list of the prices reached for

(Testimony of I. R. Keith.)

this lumber at that time. I never averaged it. That has already been introduced in evidence; it was \$51.09. Mr. Juneau got the price list I hold in my hand from Mr. Flanagin, who is the gentleman who runs the planer and who testified here before. I was not present at a conversation between Mr. Dennis and Mr. Henderson the latter part of September, 1920, involving this contract.

Witness excused.

Testimony of J. P. Lansing, for Plaintiffs (Recalled in Rebuttal).

J. P. LANSING, a witness recalled by the plaintiffs in rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

I am the same J. P. Lansing who testified before in this case. I should say the difference in this community and in this state between the sale of lumber in bulk and the sale of lumber by a specific order in cars, so far as relates to the market price or the highest market price of that lumber, was \$5 per thousand less in bulk. That is because the man that buys in bulk doesn't have an order for the stock which he buys and is taking more or less of a chance in marketing the stock after he buys it, whereas specific carload purchases are always disposed of, and there is no question as to what the seller expects to get for it.

In my experience of about 35 years, I do not

(Testimony of J. P. Lansing.)

know of any [313—207] custom that prevails here in the shipment of a transit order, that the seller shall pay the demurrage or the reconsignment fee, because transit sales are not recognized as a legitimate sale. That is because the man who handles transit sales takes a gambler's chance as to what he will get out of his stock after he gets it in transit.

One witness having testified that after February, 1920, there wasn't any market for lumber, and another that there wasn't any market after August first, I can state that the Polleys Lumber Company sales ran a little irregular during the year according to the amount of dry stock on hand; we sold and shipped the most in April, the next in March, the next in August, the next in June, the next in July, the next in May and the next in September. We shipped more in August than we did in June and July.

It having been stated that the market was demoralized in a measure by a 30% reduction by the Weyerhaeuser people, who issued a discount card along in the spring of 1920, I will say the first part of February, for some reason, the Weyerhaeuser Sales Company issued an extremely high list which was a great deal higher than the market and a great deal higher than the average firm was asking for their lumber, and then, for reasons best known to them, they reduced their prices in

(Testimony of J. P. Lansing.)

about two or three weeks, and went before the public with the statement to the effect that they had reduced prices 20 or 30%. That price they reduced 20 or 30% was not on all items. I don't know as I could specify the exact grades, but my recollection is that they made practically no reduction on the better grades, but their principal reduction was on the lower grades. [314—208]

✓ Cross-examination by Mr. POPE.

The issuance of the Weyerhaeuser card which stopped the rise in the market. I would say stabilized the market. It had been going up before that time on some, if not all, of the items. I can't state what the average drop in the market value of lumber was between August and December 31st, 1920. I don't think I ever made any comparison or figures that would justify a statement to that effect. Even though there was a knowledge of the price, the workings of the market in the early part of 1920 were so much better than from August to December 31st because the conditions of the market were so different. Up to practically the first of September the conditions were stable and normal and going along on practically an even keel, and therefore it was not necessary to make any figures so as to arrive at the average price, but after that there was more fluctuation, commencing October, November, later in the year. There was not a decided fluctuation as early as

(Testimony of J. P. Lansing.)

August. The way you put the question, I would say there was not a very decided fluctuation during the latter part of the year, at least during the year 1920. I would say there wasn't any particular drop until after October. After October there wasn't as much a drop in the price as there was in the demand; there was dropping off in opportunity to sell.

Redirect Examination by Mr. PARSONS.

There was no reduction in our prices in August over June and July.

Witness excused.

Testimony of E. H. Polleys, for Plaintiffs (In Rebuttal).

E. H. POLLEYS, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as [315—209] follows:

Direct Examination by Mr. PARSONS.

My name is E. H. Polleys; I am president of the Polleys Lumber Company, and have been in the logging and lumbering business 48 years. We handle about 25 million of lumber during the course of a year. I am acquainted in a general way with the market valuations of lumber throughout this country. I have been connected with the sales department only in a general way, overseer; Mr. Lansing has charge of our sales department entirely. Prior to that time I myself used to be a salesman. I was connected in that capacity with the Anaconda

(Testimony of E. H. Polleys.)

Copper Mining Company for four or five years—from 1900 to 1904.

I will say the difference in the market value of the sale of lumber when the specific yard of lumber is sold in bulk, a yard of three million or more, and when it is sold on specific order by carload lots or trainload lots, is \$5 a thousand.

I have never known of any custom in this country, in my experience of a great many years by which a seller on a transit order pays the demurrage and reconsignment charges; I never have paid it; I have had several men try to work it, but they never have so far as we are concerned; there is no custom to that effect. We very frequently in our business market transit orders. When we sell a car to a man for transit order when the lumber is loaded into that car it is his lumber; if he delays it in transit or to destination that is his own risk. Last year it wouldn't have taken very long, under existing freight rates, for demurrage charges to eat up an entire cargo of lumber.

The Weyerhaeuser Company are the biggest lumber dealers in the United States. The prices that they fix have an effect on the market or the prices chargeable by other people; you have [316—210] to meet them in competition. I recall that in 1920 they raised their prices early in the spring, but I couldn't tell the percentage; it was called a big raise. They afterwards changed that schedule to a degree, but I couldn't tell you the percentage of that. The reduction that they made was largely

(Testimony of E. H. Polleys.)

on common stuff. I have no knowledge as to whether the reduction price was lower than the original price from which they had raised.

Cross-examination by Mr. POPE.

We absolutely refuse to sell lumber to a man that puts transit car on it. In case, however, we were to sell a car in transit, and in case we decided we would sell such car in transit, through an agent representing us, we would expect to pay the demurrage, if he was our agent and we were paying him a salary. If he were selling on commission, we wouldn't sell it that way.

Our company cuts and markets its own lumber. We are not at all in the business of buying lumber that is manufactured by other persons. Mr. Lansing, who testified here, is connected with our company.

Redirect Examination by Mr. PARSONS.

In our experience we have bought lumber from other people; back before we manufactured ourselves we were in the jobbing business ourselves, wholesale and retail.

Recross-examination by Mr. POPE.

That was ten years ago.

Witness excused. [317—211]

Testimony of W. C. Lubrecht, for Plaintiffs (Recalled in Rebuttal).

W. C. LUBRECHT, a witness recalled by the plaintiffs in rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

I am the same W. C. Lubrecht who testified before. I testified that the Anaconda Copper Mining Company, during the period covered by the examination yesterday, followed in its sale prices the schedule fixed by the Weyerhauser people. There is a usual, ordinary measure or standard of difference between selling a yard of that size and proportions at wholesale and at retail; there would be a difference in selling a yard in bulk and selling a car as it would be ordered. As to whether I can fix it either by percentage or by dollars and cents per thousand, I have no recent experience in that, but a couple of years ago I sold a couple of broken stocks or small stocks at portable mills at from five to six dollars a thousand less than the relative prices for the same items as ranked in the price list. That would not be the difference ordinarily between wholesale and retail; the usual difference wouldn't amount to more than \$1.50 a thousand, that is, in the car trade.

I am quite familiar with the course of the Weyerhauser Company's basic list in the spring and summer of 1920. They raised their prices on February 11th; that was the last raise, up to the peak as we called it, and on February 22d, I think it was, they had this voluntary cut. I couldn't give you the per cent cut

(Testimony of W. C. Lubrecht.)

that was; I could give you the items per thousand feet on some of the grades. I think the reduction was about the same as their previous raise; I think they just kept about the way they were as stated in the early part of February. The character of lumber on which this raise and reduction was made was all of it plain; both high and low grades were affected. [318—212]

I know of no understanding at all by which the seller pays the demurrage and reconsignment charges in connection with transit sales; I have never sold anything in transit in my 25 years' experience; it is something we avoid entirely. The uncertainty of making the sale and having the value of the product eaten up in demurrage bills doesn't look to us like sale business.

It having been testified by one witness that after February, 1920, there wasn't any market for lumber at all, and by another that after August first there wasn't any market for lumber in this country, I will say I had no difficulty in selling all the lumber we found it physically possible to handle through our mill from the time we had lumber in shipping condition in May until the latter part of November. On October 4th we made a price reduction and also in the latter part of December, following the market as we found it; we had no change in price between February and October that I recall.

Cross-examination by Mr. POPE.

Our company has just myself and a stenographer,

(Testimony of W. C. Lubrecht.)

you might say, in charge of the sales and handling the sales. We handle our own timber from the time we cut it until the time we sell it. We buy some in small outfits; we buy timber for the mines and also the side cut which we have to market elsewhere. About 50% of the product would go to the mines and 50% we have to market to the trade as we market our own commercial cut.

The condition of the market at the time the bulk purchase is made would naturally have quite an effect on the difference between selling a stock in bulk and selling individual cars of lumber; if all grades were moving in proportion or without any resistance the bulk sale would move in better conformity than [319—213] it would when there were only certain items in demand on the market. I hardly see, off hand, why the car shortage should affect one much more than the other. The prices for carload lots, loaded on cars, is open at once, if you have the cars. If you don't get it on the car you don't sell it, but that would have a bearing, I think, on either method of selling, possibly more on the bulk sale through which you have to depend entirely on future car supply. A stable market would be the ideal market, or the advancing market would be the ideal market to dispose of a bulk purchase, of course. An increase in freight rates, the exact amount of which is not definitely known, but which was anticipated, would also have an effect on the market in case of a bulk purchase, providing you were not in position to make shipments before

(Testimony of W. C. Lubrecht.)

the rates would go into effect; it might have some bearing. And the ability to plane and load the lumber on cars within a specified length of time, you have to load the stock to reach your customers.

Witness excused.

Testimony of C. H. Richardson, for Plaintiffs (Recalled in Rebuttal).

C. H. RICHARDSON, a witness recalled on behalf of the plaintiffs in rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

I am the same C. H. Richardson who testified before. We handle in our plant from 20 to 25 million feet of lumber in the course of a year. I will say that the difference between the market price or highest market price of a lumber yard sold as was described to me the other day, of approximately three million feet, if it is sold by car lots or open lots or in bulk, during the period from May first to October first, 1920, is between five and six dollars. [320—214]

I do not know of any custom in this country, where the sale of lumber is made upon transit order, that the seller sustains the demurrage charges; I never heard of such a custom; we have no such practice in our establishment.

As to the market for lumber, either after February, 1920, or after August first, I would say that the best month we had was August, and the next best month was September. I don't think there any variation in our prices between June first and Sep-

(Testimony of C. H. Richardson.)

tember first or October first or until about the 4th or 5th of October.

I am acquainted with the Weyerhauser basic price list. It is not a matter of compulsion and necessity that lumber dealers, such as we, have to meet that list; to meet the competition, is all. My recollection is that they raised their prices in the early part of February; in the latter part of February they reduced it. I couldn't say as to whether the point to which they reduced it was any greater than what the original price was before they raised it; I have no recollection. I think they largely reduced more on the common lumber than on the finishing lumber. There was no variation in our price between May first and October first. We could not entirely supply the demand during that period; we were way behind in our orders all the time.

Cross-examination by Mr. POPE.

We never have sold lumber in transit. I understand it is, however, done sometimes. Assuming that I or some other person should start a car consigned to Alliance, Nebraska, before it was sold, and after the car has reached that destination a demurrage has accrued on it, and the car should be sold to some purchaser, I wouldn't say in that case the seller should [321—215] pay the demurrage. I don't know who would; I wouldn't sell lumber that way; haven't done it in 20 years; never sold a car in transit since we have been in business. In case that were actually done and the lumber was sold after the demurrage had accrued, I should say

(Testimony of C. H. Richardson.)

that the demurrage would not necessarily be paid by the seller. I should say not, if he sold it at a fixed price delivered at the customer's point. I don't know who would pay it. I don't know where the seller would get off if the car laid there for a year, say. Assuming that it laid there a week it would be the same proposition. I am not able to give you any information on that; I have never had any experience with that transit business.

Witness excused.

Testimony of Reuben Dwight, for Plaintiffs (In Rebuttal).

REUBEN DWIGHT, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Reuben Dwight; I live at Perma and have lived there for eight years. I have held the office of State Senator in my county. I am in the mercantile business at Perma at the present time. I know Ed. Love, and knew him during his residence there. I know his general reputation for truth and veracity in the community in which he lives. It was bad.

Witness excused.

Testimony of R. R. Hoyt, for Plaintiffs (Recalled in Rebuttal).

R. R. HOYT, a witness recalled by the plaintiffs for further rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

[322—216]

I live at Thompson Falls, and have been up on the Reservation. I knew Ed. Love during his period of residence on the Reservation. I am acquainted with his general reputation for truth and veracity in the community in which he lived on the Reservation. It was bad.

Cross-examination by Mr. HALL.

I am not at this time a partner of Senator Donlan; I have been associated with him.

Witness excused.

Testimony of John Mahoney, for Plaintiffs (In Rebuttal).

JOHN MAHONEY, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is John H. Mahoney; I have been in the lumber business out of Missoula for several years. I did not know Ed. Love during his residence in Missoula; I knew him in Sanders County. I am acquainted with his general reputation in the community in which he lived in Sanders County for truth and veracity, during the time I was there. It was bad.

(Testimony of John Mahoney.)

Cross-examination by Mr. HALL.

I never lived there; I had business there; that was in 1913; well, I may say 1913 we lost most of our stock, but I had interests there until 1915.

Witness excused.

Testimony closed. [323—217]

The foregoing is now, by counsel for the plaintiffs in the foregoing entitled action, submitted as the statement of evidence, and is now lodged with the Clerk of the District Court of the United States for the District of Montana, in which court said action was tried.

Dated: this 20th day of January, 1922.

HARRY H. PARSONS,

A. J. VIOLETTE,

Of Missoula, Montana,

M. S. GUNN,

CARL RASCH,

E. M. HALL,

Of Helena, Montana,

Solicitors and Attorneys for the Plaintiffs.

I hereby certify that the foregoing statement and transcript of evidence is a complete, true and correct statement and transcript of all of the evidence adduced at the trial of said cause, and the same is hereby settled, allowed and approved.

Dated this 2d day of Feb., 1922.

BOURQUIN,

Judge.

Filed Feb. 2, 1922. C. R. Garlow, Clerk U. S. District Court, District of Montana. [324—218]

That thereafter, on February 2d, 1922, petition for appeal and order allowing appeal was duly filed and entered herein, being in the words and figures following, to wit: [325]

In the District Court of the United States for the
District of Montana.

EDWARD DONLAN and BEN W. HENDER-
SON, Copartners, Doing Business Under the
Firm Name and Style of DONLAN & HEN-
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-
PANY, a Corporation, of Jackson County,
Missouri,

Defendant.

Petition for Order Allowing Appeal.....	408

To the Honorable GEORGE M. BOURQUIN,
Judge of the District Court of the United
States, for the District of Montana:

The above-named plaintiffs, Edward Donlan and Ben W. Henderson, as copartners, doing business under the firm name and style of Donlan and Henderson, deeming themselves aggrieved by the judgment and decree rendered and entered in this cause, on the 22d day of September, 1921, do hereby appeal from the said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, upon the grounds and for the reasons

specified in their assignment of errors, which is filed herewith, and they pray that this appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings, papers and documents, upon which said judgment and decree were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 2d day of February, 1922.

HARRY H. PARSONS,

A. J. VIOLETTE,

Of Missoula,

M. S. GUNN,

CARL RASCH and

E. M. HALL,

Of Helena, Montana,

Solicitors and Attorneys for Plaintiffs. [326]

The foregoing petition for an order allowing an appeal in said cause is hereby granted and the appeal allowed, upon the plaintiffs giving bond conditioned as required by law in the sum of \$300.00.

Dated this 2d day of February, 1922.

BOURQUIN,

Judge.

Filed Feb. 2, 1922. C. R. Garlow, Clerk. [327]

That thereafter, on February 2d, 1922, assignment of errors was duly filed herein, being in the words and figures following, to wit: [328]

In the District Court of the United States for the
District of Montana.

EDWARD DONLAN and BEN W. HENDERSON,
Copartners, Doing Business Under the Firm
Name and Style of DONLAN AND HEN-
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-
PANY, a Corporation, of Jackson County,
Missouri,

Defendant.

Assignment of Errors.

Come now the plaintiffs in said above-entitled cause and file this their assignment of errors, upon which they intend and will rely upon their appeal from the judgment and decree made and entered in said cause on the 22d day of September, 1921, to wit:

1. The Court erred in rendering and entering its judgment and decree in favor of the defendant and against the plaintiffs.

2. The Court erred in not rendering and entering a judgment and decree in favor of the plaintiffs and against the defendant, awarding the said

plaintiffs the relief prayed for in their complaint.

3. The Court erred in holding and decreeing that said plaintiffs were not entitled to recover anything upon their complaint in said cause, and that the said complaint, and the causes of action therein stated, should be dismissed.

4. The Court erred in holding and decreeing that there was due from said plaintiffs to defendant the sum of \$18,084.51, with interest thereon from August 10, 1921, and erred in holding and decreeing any sum or any amount to be due and owing from said plaintiffs to said defendant.
[329]

5. The Court erred in holding and deciding that plaintiffs' right to any sum or amount in excess of the sum of \$20.00 per M. for the lumber burned on August 3, 1920, depended upon a resale by said defendant of said lumber, and that before such resale no money was due said plaintiffs from the defendant and no debt existed.

6. The Court erred in holding and deciding that the defendant's promise to pay for the lumber which was burned on the 3d day of August, 1920, was not absolute, but conditional, and that plaintiffs' right to payment therefor was not vested, but contingent; and in that connection the Court erred in holding and deciding that by the destruction of said lumber the condition of defendant's liability failed, and the contingency upon which such liability of defendant depended did not

happen, and that by reason thereof both the promise of the defendant and the right of the plaintiffs thereupon expired.

7. The Court erred in holding and deciding that on the sale of the lumber by plaintiffs to defendant, and upon the payment of the sum of \$20.00 per M. therefor, the plaintiffs and defendant were and became joint adventurers in respect to any return on a resale thereof by the defendant, and in that connection the Court erred in holding and deciding that the obligations and liabilities of the defendant to the plaintiffs ceased and became extinct upon the happening of the fire and the destruction of the lumber on the 3d day of August, 1920.

8. The Court erred in holding and deciding that there was no duty or obligation on the part of the defendant to market the lumber between the 16th day of April, 1920, the date of the sale of said lumber to defendant, and the 3d day of August, 1920, the date when said lumber was destroyed by fire.

9. The Court erred in failing and refusing to hold and decide that the defendant was liable to the plaintiffs for the [330] difference between the reasonable value of said lumber on the date of said fire, to wit, the 3d day of August, 1920, and the amount of advances and expenses made and incurred by the defendant up to that time.

10. The Court erred in holding and deciding that the defendant was entitled to the whole amount of

the insurance of \$25.00 per M. upon the said lumber, destroyed by said fire on the 3d day of August, 1920, and in denying the plaintiffs the right to any part or portion of said insurance in excess of the sum of \$20.00 per M.

WHEREFORE, plaintiffs pray that the said judgment and decree be reversed and said cause remanded to the District Court of the United States for the District of Montana, for such further proceedings, and the entry of such judgment and decree, as may be commensurate with the rights of the plaintiffs in the premises.

Dated this 2d day of February, 1922.

H. H. PARSONS,

A. J. VIOLETTE,

Of Missoula,

M. S. GUNN,

CARL RASCH and

E. M. HALL,

Of Helena, Montana,

Solicitors and Attorneys for Plaintiffs.

Filed Feb. 2, 1922. C. R. Garlow, Clerk. [331]

That thereafter, on February 7th, 1922, Bond on Appeal was duly filed herein, being in the words and figures following, to wit: [332]

In the District Court of the United States for the
District of Montana.

EDWARD DONLAN and BEN W. HENDERSON,
Copartners, Doing Business Under the Firm
Name and Style of DONLAN AND HEN-
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-
PANY, a Corporation, of Jackson, County,
Missouri,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Edward Donlan and Ben W. Henderson,
copartners, doing business under the firm name
and style of Donlan and Henderson, as principals,
and United States Fidelity & Guaranty Company,
a surety company, organized and existing under
and by virtue of the laws of Maryland, and duly
licensed and authorized to do business in the State
of Montana, as Surety, are held and firmly bound
unto Turner, Dennis and Lowry, a corporation, of
Jackson County, Missouri, in the full sum of
Three Hundred Dollars (\$300.00), to be paid to
said Turner, Dennis and Lowry, of Jackson
County, Missouri, its successors or assigns, for
which payment, well and truly to be made, we bind

ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 7th day of February, 1922.

WHEREAS, on the 22d day of September, 1921, in the District Court of the United States for the District of Montana, in a suit or action pending therein, wherein the said Edward Donlan and Ben W. Henderson, copartners, doing business under [333] the firm name and style of Donlan and Henderson, were plaintiffs, and the said Turner, Dennis and Lowry Lumber Company, of Jackson County, Missouri, was defendant, a judgment and decree was rendered against the said Edward Donlan and Ben W. Henderson, copartners, doing business under the firm name and style of Donlan and Henderson, and the said Edward Donlan and Ben W. Henderson have petitioned for and obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and have filed the same in the office of the Clerk of the District Court of the United States for the District of Montana, to reverse the said judgment and decree.

NOW, the condition of the above obligation is such that, if the said Edward Donlan and Ben W. Henderson shall prosecute their said appeal to effect, and answer all costs if they fail to make

their appeal good, then the above obligation to be void; otherwise to remain in full force and virtue.

DONLAN & HENDERSON,

By E. DONLAN.

UNITED STATES FIDELITY & GUAR-
ANTEE COMPANY,

By CLINTON O. PRICE,

Its Attorney in Fact.

[Corporate Seal]

The above appeal bond is hereby approved.

Dated this 7th day of February, 1922.

BOURQUIN,

United States District Judge.

Filed February 7, 1922. C. R. Garlow, Clerk.

[334]

That thereafter, on February 7th, 1922, citation was duly issued herein, which original citation is hereunto annexed and is in the words and figures following, to wit: [335]

In the District Court of the United States for the
District of Montana.

EDWARD DONLAN and BEN W. HENDERSON,
Copartners, Doing Business Under the Firm
Name and Style of DONLAN AND HEN-
DERSON,

Appellants,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-
PANY, a Corporation, of Jackson County,
Missouri,

Appellee.

Citation.

The President of the United States to Turner, Den-
nis & Lowry Lumber Company, a Corporation,
of Jackson County, Missouri, the Above
Named Appellee, and to Messrs. Hall & Pope,
Its Solicitors and Attorneys, GREETING:

You are hereby cited and admonished to be
and appear at the United States Circuit Court of
Appeals for the Ninth Circuit, to be held at the
City of San Francisco, in the State of California,
within thirty days from the date hereof, pursuant
to an order allowing an appeal, and of an appeal
entered and filed in the office of the clerk of the
District Court of the United States for the Dis-
trict of Montana, from a final judgment and de-
cree entered on the 22d day of September, 1921,

in that certain suit or action wherein Edward Donlan and Ben W. Henderson, copartners, doing business under the firm name and style of Donlan and Henderson, are plaintiffs and appellants, and Turner, Dennis and Lowry Lumber Company, a corporation, of Jackson County, Missouri, is defendant and appellee, to show cause, if any there be, why the said judgment and decree, in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEORGE M. BOURQUIN, Judge of the [336] United States District Court for the District of Montana, this 7th day of February, 1922.

BOURQUIN,
Judge of the United States District Court for the
District of Montana.

Service of the above and foregoing citation acknowledged, and receipt of copy thereof admitted this 8th day of February, 1922.

HALL & POPE,
Solicitors and Attorneys for Defendant and Appellee. [337]

[Endorsed]: No. 892. United States District Court, District of Montana. Edward Donlan and Ben W. Henderson, Copartners, Doing Business Under the Firm Name and Style of Donlan and Henderson, Appellants, vs. Turner, Dennis & Lowry Lumber Company, a Corporation, of Jack-

son County, Missouri, Appellee. Citation. Filed Feb. 9, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [338]

That thereafter, on February 9th, 1922, a praecipe for transcript of the record was duly filed herein, being in the words and figures following, to wit: [339]

In the District Court of the United States for the
District of Montana.

EDWARD DONLAN and BEN W. HENDERSON,
Copartners, Doing Business Under the Firm
Name and Style of DONLAN AND HEN-
DERSON,

Appellants,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-
PANY, a Corporation, of Jackson County,
Missouri,

Appellee.

Praecipe for Transcript of Record on Appeal.

To the Clerk of the Above-entitled Court:

You will please prepare and certify forthwith, transcript of the record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the appeal heretofore perfected to

said court, and include in said transcript the following pleadings, proceedings and papers on file herein, to wit:

The complaint; the amended answer; the plaintiffs' reply; statement of the evidence settled and approved by the Court; memorandum decision of the Court dated August 4, 1921; additional memorandum decision dated September 3, 1921; the judgment and decree dated September 21, 1921, and entered on the 22d day of September, 1921; petition for allowance of an appeal; order allowing appeal; assignment of errors; appeal bond; citation and praecipe for a transcript of the record.

Dated this 7th day of February, 1922.

H. H. PARSONS and

A. J. VIOLETTE,

Of Missoula, and

M. S. GUNN,

CARL RASCH and

E. M. HALL,

Of Helena, Montana,

Solicitors and Attorneys for Plaintiffs and Appellants. [340]

Service of the above and foregoing praecipe acknowledged, and receipt of copy thereof admitted this 8th day of February, 1922.

HALL & POPE,

Solicitors and Attorneys for Defendant and Appellee.

Filed Feb. 9, 1922. C. R. Garlow, Clerk. [341]

Certificate of Clerk U. S. District Court to Transcript of Record on Appeal.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 341 pages, numbered consecutively from 1 to 341 inclusive, is a full, true and correct transcript of the record and proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal therein by praecipe filed as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of One Hundred Fifty-three and 95/100 Dollars (153.95), and have been paid by the appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 11th day of February, A. D. 1922.

[Seal]

C. R. GARLOW,
Clerk. [342]

[Endorsed]: No. 3835. United States Circuit Court of Appeals for the Ninth Circuit. Edward Donlan and Ben W. Henderson, Copartners, Doing Business Under the Firm Name and Style of Donlan and Henderson, Appellants, vs. Turner, Dennis & Lowry Lumber Company, a Corporation, of Jackson County, Missouri, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed February 17, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD DONLAN and BEN W.
HENDERSON, Co-partners, Do-
ing Business Under the Firm
Name and Style of DONLAN and
HENDERSON,

Appellants,

vs.

TURNER, DENNIS & LOWRY
LUMBER COMPANY, a Corpo-
ration, of Jackson County, Mis-
souri,

Appellee.

Brief of Appellants.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD DONLAN and BEN W.
HENDERSON, Co-partners, Do-
ing Business Under the Firm
Name and Style of DONLAN and
HENDERSON,

Appellants,

vs.

TURNER, DENNIS & LOWRY
LUMBER COMPANY, a Corpo-
ration, of Jackson County, Mis-
souri,

Appellee.

Brief of Appellants.

STATEMENT OF THE CASE.

On the 16th day of April, 1920, the appellants contracted with the appellee for the sale of lumber owned by them in pile at their sawmill yard at Fletcher Spur, near Pablo, Montana, and all lumber thereafter to be sawed, cut and manufactured by

them at Fletcher Spur, until the first day of January, 1921. The appellee was to pay, as an advance-ment upon the purchase price, the sum of \$20 per thousand feet on all lumber sold and then in piles at Fletcher Spur, in accordance with an inventory of such lumber agreed upon, and loan appellants \$20,-000 to be evidenced by appellants' promissory note. An advance of \$20 per thousand feet was to be paid by the appellee on all lumber thereafter manufactured by appellants under and during the life of the contract, based upon an inventory of finished piles in the millyard at Fletcher Spur, on or before the 10th day of each month, one-half of such advances to be applied and credited on the note until paid. The lumber was to be graded according to Western Pine Manufacturers Association grading rules and standards, appellants to hold the appellee harmless against any claim or loss arising under said rules or standards, and deliver the lumber f. o. b. cars at Fletcher Spur, either dressed or rough, as directed and ordered by the appellee.

Upon payment of the advance of \$20 per thousand feet, "the title and possession of such lumber" passed to the appellee and became its property, subject only to the payment of the purchase price "upon completion of the terms and conditions of this contract on the part of the vendors"; the appellants to give bills of sale for and possession of the lumber, and same was to be "marked and designed" as the property of the appellee "from the time it is so marked and bill of sale given." The

land upon which appellants' lumber yard was located was leased to the appellee for and during the life of the contract, subject to the right of appellants' occupancy and use for the purpose of the contract, and the appellee had the right to use appellants' planer to dress the lumber, in the event of appellants' failure to carry out the contract, in order to protect itself against loss on account of the advances made by it.

Appellants were required to keep all lumber sold and in the yard insured against loss by fire, at their own expense, for \$25.00 per thousand feet, loss payable to appellee. The appellee was required to market and sell the lumber for the highest market price obtainable at the time of sale, and upon delivery of the lumber on cars, pay appellants, as the purchase price for said lumber, the highest market price for which it was sold, less 15%, and an additional 2% trade discount, and the \$20.00 per thousand feet advanced by the appellee upon the purchase price (Tr. pp. 15 to 18).

Two million feet of lumber was in the yard at the time the contract was made, and on the same day the appellants executed and delivered to the appellee a bill of sale for that amount (Tr. pp. 135 to 136). Thereafter and prior to August 3rd, 1920, an additional 1,338,412 feet of lumber was manufactured and piled in the lumber yard, according to contract requirements, for which bills of sale were delivered to the appellee, and the lumber marked and stenciled with appellee's name (Tr. pp. 137 to 139).

All of it with the exception of some 322,000 feet, which had been shipped upon orders from the appellee, was destroyed by fire on August 3rd, 1920. Something over 1,600,000 feet of lumber was manufactured and piled in the yard subsequent to the fire and before the institution of this action, and recovery of its value was also sought in this suit, but the questions raised and presented for determination by this court upon this appeal, do not require any particular reference to the dealings between the parties subsequent to August 3rd, 1920. Aside from the appellants' claim of the amount due them for lumber manufactured, piled and marked, and transferred by bills of sale to the appellee, pursuant to the terms of the contract prior to the commencement of the action, and the counter-claims of appellee for moneys loaned and advanced, the principal controverted issue litigated in the trial court was the nature and character of the transaction between the parties culminating in the making of the contract of April 16th, 1920. The appellants based their right to recover upon the ground that the contract, together with the bills of sale given appellee when the lumber had been piled and marked, effected an absolute sale and transfer of the title entitling them to recover the market value of the lumber destroyed, less advances made on the purchase price and the percentages provided by the contract; the appellee contended that the contract, as drawn and executed, did not express the intentions and understanding of the parties, but that under the terms

of the agreement actually made, the appellee should simply take over and handle the lumber as appellants' representative, in the capacity of sales agent, and the bills of sale were to be given and received simply "as security and as evidence of a factor's lien" (Tr. pp. 30 to 44).

The trial court rejected the appellee's contention and found and held that the contract was one of sale and had "only enough of the *indicia* of agency to give some color to a claim of the latter"; that the parties intended and accomplished a sale of the lumber, and that upon payment of the \$20.00 per thousand feet, the absolute property in lumber and money, respectively, vested in appellee and appellants, beyond return, recall or repayment, and that thereafter the appellants had no interest in the lumber save that it be resold for the purposes of the contract, such resale to be according to appellee's "judgment of time, place, person, price, and terms," but within a reasonable time, and for the highest reasonably obtainable price. That by the destruction of the lumber the appellee lost its investments and its prospective profits, and appellants lost whatever they might have been entitled to upon a resale of the lumber by the appellee under the contract, the appellee's promise to pay not being absolute but conditional, and appellants' right to payment not vested but contingent (Tr. pp. 117 to 118). Upon appellee's counter-claims the court found that there was due from appellants the sum of \$18,048.51, with interest, and judgment and decree dismissing the

appellants' complaint and causes of action, and awarding appellee \$18,221.17, was rendered on September 21, 1921 (Tr. pp. 125 to 126), from which the appellants appeal to this court.

ASSIGNMENT OF ERRORS.

1. The court erred in rendering and entering judgment and decree in favor of the appellee and against the appellants.

2. The court erred in holding and decreeing that the appellants were not entitled to recover anything upon their complaint, and that the said complaint, and the causes of action therein stated, should be dismissed.

3. The court erred in holding and deciding that appellants' right to any sum or amount in excess of the \$20 per thousand feet advanced for the lumber burnt on August 3rd, 1920, depended upon a resale of said lumber, and that before such resale no money was due from the appellee and no debt existed.

4. The court erred in holding and deciding that the appellee's promise to pay for the lumber which was burned on the 3rd day of August, 1920, was not absolute, but conditional, and that the appellants' right to payment therefor was not vested, but contingent, and in that connection the court erred in holding and deciding that by the destruction of said

lumber the condition of appellee's liability failed, and the contingency upon which such liability of appellee depended did not happen, and that by reason thereof, both the promise of the appellee and the right of the appellants thereupon expired.

5. The court erred in holding and deciding that on the sale of the lumber by appellants to appellee, the appellants and appellee were and became joint adventurers in respect to any return on a resale thereof by the appellee; and in that connection the court erred in holding and deciding that the obligations and liabilities of the appellee to appellants ceased and became extinct upon the happening of the fire and the destruction of the lumber on the 3rd day of August, 1920.

ARGUMENT.

Appellants' several assignments of error are all based upon what we conceive to be an erroneous application by the learned Judge of the trial court of certain principles of law which have no bearing or determinative force in this case. The law invoked by the court is that governing in cases of executory contracts, but when the court found and held that the parties intended and accomplished a sale, effecting a complete and unconditional transfer of title to the lumber from appellants to appellee, the liability of the appellee became then and there also irretrievably fixed. In *Williston on Sales*, par-

agraph 301, the applicable rule, and the manner of its establishment, is stated as follows:

“It was early assumed without discussion that the maxim *res perit domino* was of universal application, and this assumption has sufficed to fix the law.”

And in a note, subjoined to the above quoted text, the author says:

“In *Rugg v. Minett*, 11 East 210, it was taken for granted that risk attends title, and the only discussion related to the question whether the title had in fact passed. So clear is the law that it is hardly formally stated by so acute a writer as Benjamin. The only statement he makes is a casual one without citation of authorities in ¶308.”

But even if, as to some of its provisions, the contract of April 16th, 1920, remained executory at the time of the destruction of the lumber on August 3rd, 1920, that fact did not operate to leave with or impose upon the appellants, the risk of loss of any of the lumber burnt. The very authorities referred to by the learned trial Judge as sustaining the propositions upon which his conclusions are based, are squarely opposed to the inferences, as to their import, which are attempted to be drawn therefrom. Thus, the continued existence of the subject matter of the contract may only be implied, as a condition of performance, when the circumstances or the event which rendered performance impossible “*were not*

contemplated when the contract was made."

7 Halsbury, Laws of England, page 430.

The appellee's undertaking to sell the lumber as required by the contract was not a mere conditional promise depending for its fulfillment upon future contingency, as held by the trial court, but it was a part of the very consideration of the contract and imposed upon the appellee an absolute and unqualified obligation subject to no limitations or exceptions whatsoever. As expressed in the contract, the appellee

"shall market and sell said lumber for the highest market price obtainable at the time of making such sale,"

and to give the words used a meaning such as is attributed to them by the trial court, would require the interpolation of a proviso making the obligation to sell dependent upon the existence of the lumber at such time as the appellee should choose to dispose of it. There is, in fact, nothing left to chance or eventuality in the consummation of the object of the contract, except *the amount* of the purchase price to which the appellants should ultimately be entitled.

We invoke, again, the authority relied upon by the learned trial Judge for the applicable rule to a situation of that kind:

"A party who has made an absolute promise is not discharged from liability if it afterward

appears that it is impossible for him to perform the contract, even though this is not due to any default on his part. It is his own fault if he runs the risk of undertaking to perform an impossibility. * * * * Even if the impossibility is caused by what is called the act of God, the promisor is not in such case excused from performing his promise. The ordinary rule is that, where *the law creates a duty*, and the person on whom it is imposed is disabled from performing it without any default of his own, by the act of God or the King's enemies, the law will excuse him; but when a person *by his own contract* unconditionally undertakes a duty, he is bound to perform it or take the consequences, notwithstanding any accident by inevitable necessity." (Italics ours.)

7 Halsbury, Laws of England, pages 427 to 428.

As pointed out in Halsbury's Laws of England, the implied condition in executory contracts of the existence of the subject matter of the contract at the time of performance cannot be supplied by judicial construction, unless the event rendering performance impossible was not within the contemplation of the parties at the time the contract was made. But here, not only was the loss which might occur in the grading of the lumber according to Western Pine Manufacturers' Association grading rules and standards provided for, but the possibility of the destruction of the lumber by fire was contemplated by the parties at the time the contract was made,

and precautionary measures taken to guard against and mitigate the loss if that possibility should materialize. "The vendors," says the contract, "shall at their own expense and during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25 per thousand feet, the loss thereon to be made payable to the vendees" (Tr. p. 18). Hence, the rule, invoked by reference in the trial court's decision to 13 Corpus Juris, on page 643, is by the exceptions to the rule, enumerated and stated on the next succeeding page of the authority cited, conclusively shown to be wholly inapplicable here. In 13 Corpus Juris, subject "Contracts," page 644, the exceptions to the rule are given as follows:

"Exceptions. The rule just stated has been held to have no application to a case where the thing destroyed is the thing which one of the parties has expressly contracted to produce by manufacture or otherwise. *Nor to a contingency reasonably to be anticipated*, such as the impossibility to perform a subcontract where the principal contract is terminated according to the provisions." (Italics ours.)

In fact, that intervening casualty, rendering performance impossible, does not excuse a failure to perform when the event could have been anticipated, had already been announced at page 639 of the text, where it is said:

"So where a subsequent impossibility of per-

formance might have been foreseen by the promissor and he chooses to bind himself absolutely, he is not excused,”

and this is followed with a statement of the general rule, supported by a cloud of cited cases, that:

“Where performance becomes impossible *subsequent to the contract*, the general rule is that the promisor is not therefore discharged.” (Italics ours.)

13 Corpus Juris, subject “Contracts,” §§711 and 712, page 639.

In *Jones v. United States*, 96 U. S. 24, 24 L. Ed. 644, the fact that the event which made performance of the contract to sell and deliver impossible, was not foreseen, was held to be no excuse for failure to perform. There the court said:

“Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control.”

In *C., M. & St. P. Ry. Co. v. Hoyt*, 149 U. S. 1, 37 L. Ed. 624, the same principle was announced, the court saying:

“There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, *where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.*” (Italics ours.)

And in *Berg vs. Erickson* (C. C. A.) 234 Fed. 817, Judge Sanborn, after a review of the authorities, states the rule “adopted by the Supreme Court, which must prevail here,” and says:

“It is that, although general words, which cannot be reasonably supposed to have been used with reference to the possibility of an event, may not be held to bind one, yet, where one, at the time of making his contract, must have known or *could have reasonably anticipated, and in his contract could have guarded against*, the possible happening of the event causing the impossibility of his performance, and nevertheless he makes an unqualified undertaking to perform, he must do so or pay the damages for his failure.” (Italics ours.)

In *Mitchell vs. Weston* (Miss.), 45 So. 571, 15 L. R. A. (N. S.) 833, the contract required the keeping of a bridge in repair, and to rebuild it in the event of its destruction or removal “from any cause, fire excepted.” The bridge was destroyed by an unprecedented flood—an act of God. In holding

the defendant liable upon the contract for the rebuilding of the bridge, the court said:

“It is obvious that the obligator’s attention was directed to exceptions which should be made and that the only thing excepted against was loss by fire. Whilst making his exceptions, if he had intended to except against the act of God, he should have done so.” (Italics ours.)

And so, Judge Sanderson, speaking for the court in Polack vs. Pioche, 35 Cal. 416:

“A general covenant to repair is binding upon the tenant under all circumstances. If the injury proceeds from the act of a stranger, from storms, floods, lightning, accidental fire, or public enemies, he is as much bound to repair as if it came from his own voluntary act. Such has been the settled rule since the time of Edward III. (2 Platt on Leases, 186, 187, and cases there cited.) If the tenant desires to relieve himself from liability for injuries resulting from any of the causes above enumerated, or from any other cause whatever, *he must take care to except them from the operation of his covenant.* Id. 186, 187. So the defendant in the present case is liable, unless, in the language of the exception contained in his covenant, the damages were caused by ‘the elements or the acts of Providence.’” (Italics ours.)

To the same effect:

Moxham v. Sherwood Co. (C. C. A.), 267 Fed. 781.

II.

The cases above cited and referred to deal with executory contracts and their construction in the determination of the rights and obligations of the contracting parties in the event of impossibility of performance because of intervening accidental causes. The question of sale and transfer of title was not involved or presented in any of them, the risk of meeting the requirements of the particular duties imposed being dependent upon the terms of the contract permitting or barring the introduction of conditions by implication excusing performance when rendered impossible. But rules of construction cannot be resorted to for the creation of implied conditions to release one from the obligation of performance, or the payment of the purchase price, where there is a sale and title has passed. The distinction between the rules which control in cases of that kind, and those which may be applied, in exoneration of contractual requirements, if the circumstances of the case permit, in cases of executory contracts where title has not passed, or where the question of title is in no way involved, is adverted to, though the applicable rule is not distinctly stated, in a Case Note in 12 American Law Reports, at page 1280, where the author says:

“The question as to who must bear the loss on the destruction of a chattel which is the subject of the sale may depend, evidently, on the question whether the title has passed to the

buyer. And, of course, this question is not treated in the present annotation, which deals with the question arising only on the assumption *that the title has not passed*. Strictly speaking, the question of liability for damages for non-performance of a sales contract, due to intervening impossibility of performance, *arises only when the seller is sued for damages for failure to deliver a specific chattel which he has agreed to sell, but which has been destroyed since the making of the contract and before title has passed*. If the action is by the seller against the buyer for the purchase price, *the question is not strictly one of impossibility of performance as regards the defendant.*" (Italics ours.)

The fact of the matter is, it is not at all a question of impossibility of performance in any sense, in the absence of contractual provisions placing the risk elsewhere than where the law puts it, and that is,—upon the holder and owner of the title. As stated in Williston on Sales, *supra*, the maximum *res perit domino* is of universal application and admits of no exceptions, save such as have been specifically and expressly reserved. The risk of loss, and the responsibility to make good that loss, abides with and follows the title, and this does not merely mean the risk of the buyer's own loss, but the risk of loss by reason of non-compliance with, or non-performance of, every obligation which the contract imposes, whether it be one for the payment of money, or the doing of something else.

As was said in *Ingle vs. Jones*, 2 Wallace 1, 17 L. Ed. 762:

“The principle, which controlled the decision of the cases referred to, rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, *it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none.* It does not allow a contract fairly made to be annulled, and it does not permit *to be interpolated what the parties themselves have not stipulated.*” (Italics ours.)

How utterly inconsequential the continued existence or the non-existence of the subject matter of the sale is with reference to the question of liability for the payment of the purchase price is pointedly exhibited in the Kentucky case of *Sweeney vs. Owsley*, 14B. Mon. 413, and in the Indiana case of *Henlin vs. Hall*, 4 Ind. 189, each decided the same way upon identical facts. In *Sweeney vs. Owsley*, the defendant Owsley purchased from the plaintiff a mule colt at the price of \$57.50, paying \$5 down on the purchase price when the bargain was made. Nothing was said or stipulated as to the time of payment of the remainder, but the colt was to stay with the mare, its mother, until it was weaned. Before that had been done, and before delivery of the colt, it died, and the action was for the recovery of

the unpaid balance of the purchase price. In holding that the defendant was liable, the court said:

“So soon as a bargain of sale of specific personal property is struck, *the contract becomes absolute*, without actual payment or delivery, *and the property and the risk of accident to it, is in the buyer.* * * *

“If in the purchase of articles which from necessity or convenience are permitted to remain in the possession of the vendor, and the vendee wishes to avoid payment in case the property should perish before the time of delivery, *he should stipulate to that effect.*” (Italics ours.)

Indeed, there is no room for construction, nor for inquiry regarding the question of liability for the payment of the purchase price in the event of the destruction of the property sold, where, as in the case at bar, the title is transferred to and vested in the purchaser by the very terms of the contract. As was said in *Hatch v. Standard Oil Co.*, 100 U. S. 124, 25 L. Ed. 554:

“Where it appears that there has been a complete delivery of the property in accordance with the terms of a sale, the title passes, although there remains something to be done in order to ascertain the *total value of the goods at the rate specified in the contract.*” (Citing cases.)

“*Beyond controversy*, such must be the rule

in this case, *because the contract provides that upon the piling and cutting of the staves as required by the instrument, the delivery of the same shall be deemed complete, and that the staves shall then become and henceforth be, the property of the plaintiffs absolutely and unconditional.*" (Italics ours.)

And as was said by this court, in stating the rule of liability in cases of this kind, in *Noyes vs. Marlott* (C. C. A.) 156 Fed. 753:

"Accident was hardly contemplated; but, when it occurred, by the rules of law, *the owner must be the sufferer.*" (Italics ours.)

To the same effect:

Standard Oil Co. vs. Van Etten, 107 U. S. 325, 27 L. Ed. 319;

Leonard vs. Davis, 1 Black 476, 17 L. Ed. 222;

The Elgee Cotton Cases (U. S. vs. Woodruff), 22 Wallace 180, 22 L. Ed. 863;

25 Halsbury, Laws of England, page 188;

1 Mechem on Sales, paragraph 483.

III.

At the time of the making of the contract on April 16th, 1920, two million feet of lumber was stacked and piled ready for the market in the yard

at Fletcher Spur. It had been purchased by the appellants, together with timber not yet manufactured into lumber, from Major Smead at a price of \$35 per thousand feet (Tr. pp. 143, 150). It was transferred to the appellee on the same day, vesting in it a title "absolute, beyond return or recall." The transfer was subject to no condition or limitation, except the obligation on the part of the appellee to sell, according to its own untrammelled judgment as to "time, place, price and terms" of sale, "for the highest market price obtainable at the time of making such sale" (Tr. p. 117). Appellants were to load and ship the lumber when ordered, and although requests for orders were made by them as early as May 8th, 1922, and possibly earlier (Tr. p. 217), and such requests were repeated from that time on at frequent intervals (Tr. pp. 219, 221), no orders were given or received until more than two months after the making of the contract and the transfer of the lumber to the appellee (Tr. p. 220). The appellee expressed its satisfaction in knowing from appellants' letters of June 16th and 18th, respectively, that appellants were "disposed" to leave the matter of sales in appellee's hands, assuring the appellants that it had appellants' interests at heart as much as its own (Tr. p. 222). Meanwhile the lumber market was good; as stated by Mr. Lanning, Sales Manager for Polleys Lumber Company, it was "stiff" from April until October 1920, "absorbing all that the buyers could get." The demand, he says, was fully equal to the supply, and it would not

have taken him “over 30 days” to sell the lumber piled and stacked at Fletcher Spur, at a price of \$51.51 per thousand feet f. o. b. Fletcher Spur (Tr. p. 170 to 172). Other experienced lumbermen testified substantially to the same effect (Tr. p. 182).

The learned trial Judge apparently assumed that the obligation on the part of the appellee to sell the lumber was a conditional one because the amount of the purchase price to which the appellants would be entitled was contingent. But the time when, the price for which, and the terms upon which a sale might and should be made was a matter depending upon no conditions whatever. It was, on the contrary, a matter committed absolutely to the will and wishes of the appellee, untrammelled by any restrictions in doing what its judgment in that regard should dictate. It chose and elected to hold the lumber waiting for a more profitable market, but in doing so it took upon itself the risk of loss, and the liability to pay what would have been realized if a sale had been made before the destruction of the lumber. As was said in *Booth vs. Spuyten, Etc., Rolling Mill Company*, 60 New York, on page 491:

“The contract was made December twenty-seventh and the steel caps were to be delivered on the first day of April thereafter, The mill burned on the tenth day of March; and the proper construction of the finding is, that the defendant was prevented, after that time, from completing the contract, but there was ample

time, prior to that event, to have manufactured the caps. A party cannot postpone the performance of such a contract to the last moment and then interpose an accident to excuse it. *The defendant took the responsibility of the delay.*" (Italics ours.)

The mere fact that the price to be paid to the appellants was made to depend upon market conditions, and a resale became impossible, does not defeat or impair appellants' right of recovery. As stated in Mr. Freeman's Note to the case of Tufts vs. Griffin, 22 Am. St. R. on page 866:

"Or where goods are sold and delivered, to be paid for on the happening of some event, the vendor may recover though the event on which payment is made to depend has been made impossible by the happening of an accident. Thus, where all the wood standing upon a certain lot was purchased at so much per cord, to be cut and hauled, by the purchaser, measured in his yard and paid for after measurement, and after a part of the wood had been cut and hauled, a large part remained on the land, and was there burnt, the court decided that the sale was complete, and that the seller could recover the price of the wood burnt, upon proof of its quantity."

Citing:

Upson vs. Holmes, 51 Conn. 500.

In Neally vs. Wilhelm (Iowa), 61 Am. ¹²⁴118, plaintiff had been negotiating for the sale of a cow to the defendants, the latter agreeing to go and see the

cow, which was not done. Defendants then directed plaintiff to deliver the cow to their slaughter-house, and agreed to pay as much for her as though they had previously seen her, and she was accordingly delivered. Defendant vendees, not finding her as good as expected, ordered the cow turned out and she was lost. In holding the defendants liable for the reasonable value of the cow, the court said:

“The agreement with Neally’s agent was unconditional. He was to deliver the cow to defendants, or their man, at their slaughter-house, and they would pay as much for her as though they had personally seen her. The cow was delivered accordingly into their possession, and thereupon they became liable for the cow.
* * *

“The price was dependent upon the condition of the cow; the sale was not. The delivery and sale were unconditional and the price conditional.”

As in the Wisconsin case of McConnell vs. Hughes, 29 Wis. 537, so does the contract here furnish “a criterion for ascertaining the price” to be paid. There the price to be paid plaintiff for wheat which he had sold to defendants was “*ten cents per bushel less than the Milwaukee price on any day thereafter,*” which the plaintiff should name. After delivery of the wheat, but before the naming of the day for determining the price, the wheat was burned. It was delivered on February 7th, 1870, it was burned and destroyed on March 11th, and

thereafter the plaintiff named the 24th day of March, 1870, as the day fixing the price of the wheat. In holding the vendees liable for the Milwaukee market price of wheat on the day named by the plaintiff, the court said:

“But it is urged on behalf of the defendants that the transaction was invalid as a sale, because the contract did not limit the plaintiff to the selection of any particular day, or of a day within a specified time, on which the market price of wheat in Milwaukee should control the price of the wheat in question, but left him the option to select any day in the future for the purpose of fixing the price.

“The contract furnishes a criterion for ascertaining the price of the wheat; leaving nothing in relation thereto for further negotiation between the parties. *This is all that the law requires.* Story on Sales, 220. No case has been cited, and we are unable to find one, which holds that it is essential to the validity of a sale in such cases that the criterion agreed upon should, by the terms of the contract of sale, be applied, and the price thereby determined, on any specified day or within a specified time. Judge Story, in the section of his treatise above cited, evidently does not intend to lay down any such rule. It may be that, if the plaintiff had delayed unreasonably to make such selection after being requested to make the same, he might be compelled to do so. But we do not decide this point.” (Italics ours.)

The applicable rule in cases of this kind is stated with admirable precision in a Case Note in 19 L. R. A. (N. S.) pp. 198-199, where the author says:

“As has been before stated, most of the decisions regard as immaterial the impossibility of ascertaining the exact price *in accordance with the terms of the contract*. These authorities make the right of the seller depend *upon the fact of ownership of the destroyed goods*. *If the title has passed to the buyer, the risk has also become his*. Therefore, when a seller seeks to recover the price of goods which have been delivered to the buyer, but which have been destroyed before the quantity has been ascertained and the price fixed, it is incumbent upon the seller to show that he has parted with the ownership of the goods.”

And that is the rule which is applicable and controlling here. As was held in *Leonard vs. Davis*, 1 Black 476, 17 L. Ed. 222:

“When the terms of sale are agreed on, and the bargain is struck and everything the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery; *and the property and the risk of accident to the goods vests in the buyer.*” (Italics ours.)

In 25 Halsbury, Laws of England, page 147, paragraph 270, the rule is stated as follows:

“Where the ascertainment of the price depends upon the goods being weighed, measured,

tested, or counted, *or upon some other act or thing being done to or in relation thereto*, and such act has become impossible by the perishing of the goods, the buyer, if liable to pay the price, must pay a sum reasonably estimated."

That the impossibility of ascertaining and fixing the price of personal property sold, in accordance with the contract provisions, does not preclude a recovery if a criterion for its ascertainment is available, is settled law everywhere. Thus in *Standard Oil Company v. Van Etten*, 107 U. S. 325, 27 L. Ed. 319, the Court said:

"And as the risk follows the title, any loss that subsequently occurred, by non-delivery on the part of the carrier, would be the loss of the defendant below; and the plaintiff would be entitled to recover the contract price, on proof of the quantity of single pieces reduced to matched headings, delivered at Lapeer upon the best evidence that could be adduced under such circumstances, *although they could not be actually counted and matched at Cleveland, as required by the terms of the contract.*" (Italics ours.)

And, as was said by Judge Wolverton in *Wadhams & Co. vs. Balfour* (Ore.), 51 Pac. on page 647:

"In this case, by the passing of title, *the condition became a condition subsequent*; and the property having been lost, the opportunity for examination and acceptance has become impossible; but, the title having passed, the loss must

fall upon those with whom it vests, and hence the duty to pay for that which has been lost.” (Italics ours.)

Here, the same as in *Noyes vs. Marlott* (C. C. A.), 156 Fed. 753, the thing to be done for the ascertainment of the price to be paid was committed to the vendee; here, by a sale of the lumber at the highest market price obtainable; there, by a scale of the logs before their removal from the boom, “*and not otherwise.*” In both cases the means provided for the fixing of the purchase price failed because of the loss of the logs in one case and the destruction of the lumber in the other. In stating the contentions of the parties as to the nature of the transaction, and holding that it was a sale passing the ownership of the logs to the vendee, Judge Hunt, speaking of the right to recover, although the contract means for the ascertainment of the value of the logs had been rendered impossible, said:

“Defendants in error contended that they performed all of the acts required of them in the contract; that they put in the slough and boom designated in the contract the number, kind, and character of logs specified; that nothing was left for them to do; that the plaintiff in error was to remove the logs from the slough and to scale them, *but that this was merely a means of determining the amount of compensation due to defendants in error for the logs;* and that as delivery had been made as required, title to the logs passed to plaintiff in error,

hence that the peril to which the logs were exposed was plaintiff's. * * *

“An ascertainment of the amount *to be due* was contemplated, but the loggers *only undertook* to deliver the quantity and kind of logs that they proved were put into the slough, as designated in the contract. Referring to the language of the contract, it will be observed that the loggers were ‘to fell, cut, raft, drive and deliver’ logs of certain dimensions and quality as specified. They did all these things and transferred complete title, possession and control to Noyes. * * *

“Stress is laid by plaintiff in error upon the words ‘*and not otherwise,*’ which conclude the provision of the contract defining the obligation of Noyes. *But this phrase only emphasizes the immediately previously fixed and limited method of ascertaining a settlement of accounts. No other method was to be allowed.* We do not think it can be regarded as *qualifying the sale itself by making it conditional upon Noyes hauling the logs out and scaling them.* In trusting to Noyes to ascertain the quantity of logs for which he was to pay, the loggers displayed confidence in him, *but the sale was not affected,* for the sellers had nothing to do to put the logs into deliverable shape. It had been completely delivered.” (Italics ours.)

Then, after quoting from *Macomber vs. Parker*, 13 Pick (Mass.) 183, to the effect that where a sale of personal property is actually made and title is transferred to the vendee,

“the weighing, measuring, or cutting afterwards would not be considered as *any part of the contract of sale*, but could be taken to refer to the adjustment of the final settlement as to the price,” (Italics ours.)

the learned Judge concludes as follows:

“In conclusion, we believe that the proper construction of the contract is that the parties intended that Noyes should become the owner of the logs when actually delivered into the slough, and that, from the time of delivery so made, he was the owner and could have recovered the property, had it been attached under writ issued in an action brought by a creditor of the loggers. *Accident was hardly contemplated; but, when it occurred, by the rules of law the owner must be the sufferer.*” (Italics ours.)

This is decisive of appellants' right to recover. What the measure of that recovery should be depends upon the evidence adduced at the trial, and is a question for the determination of the trial court. There is a conflict in the testimony upon the question of the market value of the lumber, but according to the witnesses who testified on behalf of the appellants upon that issue, the amount sued for in the complaint is far below that to which the appellants would be entitled. At or near the close of the trial of the case, an amended complaint was offered and submitted, and leave asked for its filing, increasing the amount of the market value of the

lumber sold from \$149,447.22, as stated in the complaint, to \$170,502.87, and the amount for which judgment was asked from \$60,000 to \$85,054.47. But as, under the courts' view of the facts of the case, and its conception of the law applicable thereto, the appellants were held not to be entitled to any amount, the application for the filing of the amended complaint was not acted upon. It is clear, however, that the courts' application of inapplicable law was prejudicial error, and the case should be reversed and remanded.

Respectfully submitted,

HARRY H. PARSONS,

A. J. VIOLETTE,

GUNN, RASCH & HALL,

Solicitors and Attorneys for Appellants.

2

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD DONLAN and BEN W. HENDER-
SON, co-partners, doing business under the
firm name and style of DONLAN AND
HENDERSON,

Appellants,

v.

No. 3835

TURNER, DENNIS & LOWRY LUMBER
COMPANY, a corporation of Jackson County,
Missouri,

Appellee.

BRIEF OF APPELLEE.

CHARLES H. HALL,
WALTER L. POPE,
REES TURPIN,

*Attorneys and Solicitors for De-
fendant and Appellee.*

FILED

MAY - 3 1922

F. O. MONCKTON,
CLERK

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BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Appellants' counsel in their statement of the case set out their own conclusions rather than the facts from which the conclusions are drawn. Every case cited by appellants so materially differs in its facts from the situation here to be passed upon that it is highly important that the court understand the essential elements of this transaction and the issues of law actually presented by the facts of this case before applying any of the cases.

This action was commenced by attachment by Donlan & Henderson as co-partners, citizens of Montana, against Turner, Dennis & Lowry Lumber Company, a corporation, a citizen of Missouri, in January, 1921, in the District Court of Missoula County, Montana, and was removed to the District Court for the District of Montana upon petition of defendant. After removal, defendant filed an answer setting up a counterclaim for a balance of notes made by defendant and demanding an accounting on transactions involving lumber destroyed by fire as hereinafter described and other lumber which was cut after the fire occurred. It developed at the trial that plaintiffs, the appellants here, were seeking to recover from defendant, appellee here, the difference between what appellee had advanced on the lumber destroyed by fire and what appellants alleged to be the reasonable market value of it at the time of the fire, which difference they claimed was \$60,000.00. Since appellants had purchased two million feet of the lumber about April 15, 1920, from one Smead and insured it for \$35.00 per thousand feet, the amount they say they paid for it (Tr. 142), and the remainder of the destroyed lumber was cut between that date and August 3, 1920, and was insured by appellants as it was cut for an additional \$60,000.00, it is apparent that appellants are demanding that appellee pay them quite a substantial profit on operations covering a little over three months. Appellee denies all liability to appellants for the destroyed lumber, and, while it does not affect the issues presented by this appeal, denies that any such loss as appellants claimed either was proved or existed.

On August 3, 1920, a little over three million feet of lumber which was in piles in the yard of the appellants at Fletcher Spur, near Pablo, Montana, awaiting disposition under what the trial court terms "a somewhat novel

contract," was destroyed by fire. Appellants carried \$130,000.00 insurance on the lumber which they say was intended to meet the requirements of the contract between the parties requiring appellants to carry insurance to the extent of \$25.00 per thousand feet in favor of appellee and to cover appellants' own loss or risk. (Tr. 141-142). Appellants paid appellee \$60,000.00 of the first \$70,000.00 of insurance collected and promised to pay out of further collections of insurance the remainder of what was due from appellants to appellee. (Tr. 228, 231-232, 234). Never until they brought this suit did appellants claim to appellee that appellants did not owe appellee some amount of money, and until this suit was brought it was conceded by all parties that the insurance was to be applied first to discharging appellants' obligation to appellee under the contract, and next as far as it would go, to any loss suffered by appellants by reason of the fire, and that the remainder of the loss, if any, must be borne by appellants. Up to the time this suit was filed the only contention made by appellants was that, since appellee had advanced only \$20.00 per thousand feet on the lumber destroyed, it should not have \$25.00 per thousand feet insurance as provided in the contract. Donlan testified: "There was no disposition on my part to deny and I never denied that the defendant in this case was entitled to that pro rata insurance, to cover that portion of the lumber covered by their bill of sale." (Tr. 370).

In this suit plaintiffs, for the first time, advanced the theory that the transaction constituted a sale by them to defendant for resale by it and that plaintiffs should recover what they might have received if the lumber had not been burned but had been sold as contemplated by the contract.

The learned trial judge held that the facts of this case do not support the legal theory advanced by plaintiffs, rendered judgment in favor of defendant against plaintiffs in the sum of \$18,084.51, and incidentally held that other lumber cut under the contract since August 3, 1920, the date of the fire above described, is the property of defendant subject to the contract. From this judgment plaintiffs appealed without giving supersedeas bond.

In aid of the court we will describe the situation the parties undertook to meet, set out their agreement and briefly describe what they did under it. We will here confine ourselves to the evidence abstracted and reserve comment for that part of our brief devoted to argument.

The defendant, appellee here, is in the wholesale lumber business. As a part of its business it acted as a sales agent, or sales organization, for those mills which didn't have selling organizations of their own or had insufficient selling organizations, and acted as backers to small millers who hadn't sufficient capital to finance their own operations and who required loans or advances in order to take care of their operations. (Tr. 199). The plaintiffs, the appellants here, had a sawmill at Fletcher Spur, near Pablo, Montana, and made an arrangement with appellee to advance them money for their operations and market their lumber. With these purposes in view they entered into a writing dated April 16, 1920, the general effect of which is as follows:

It was agreed that appellee should pay appellants as an advancement thereon \$20.00 per thousand feet of lumber inventoried and piled in appellants' yard and should also loan appellants \$20,000.00 to be evidenced by appellants' notes, and that appellee should also pay and advance to

appellants the sum of \$20.00 per thousand feet on all lumber to be thereafter sawed by appellants under and during the terms of the contract. The first advancement on the lumber in pile at the time of the agreement was to be, and was, paid in cash, but the advancements of \$20.00 per thousand feet to be made on lumber subsequently cut was to be made by paying \$10.00 per thousand in cash and applying an amount equal to \$10.00 per thousand feet on the \$20,000.00 promissory notes of appellants above mentioned; the intention being to use half of these advancements to reduce the amount of the notes, payable by appellants on a day certain, and add it to the amount repayable by appellants as the lumber should be marketed as hereinafter described. Both the notes and the advancements were to bear interest at the rate of seven per cent per annum until paid. The interest on the advancements was to be computed and adjusted monthly, based upon the balance thereof remaining against appellants, after deducting such advancements from the sale of all shipments in accordance with the following arrangement agreed upon for marketing the lumber and disposing of the proceeds: The appellants were to deliver the lumber f. o. b. cars at Fletcher Spur, either dressed or rough, as directed by appellee; the appellee was to market and sell the lumber for the highest market price obtainable at the time of making a sale, deduct from the net proceeds a 2% trade discount, a commission of 15% for its services in selling and the \$20.00 per thousand feet theretofore advanced by it and honor appellants draft for the balance. In the meantime appellants were to insure in favor of appellee to the amount of \$25.00 per thousand feet.

The agreement, as it was written, is as follows (Tr. 15):
15):

EXHIBIT "A"

"CONTRACT OF SALE"

"This agreement, made, in triplicate, this 16th day of April, 1920, by and between Donlan & Henderson, a copartnership, of Pablo, Missoula County, Montana, hereinafter called the vendors, and Turner, Dennis & Lowry Lumber Company, a corporation of Jackson County, Missouri, hereafter called the vendees.

WITNESSETH,

"That said vendors, for and in consideration of the payments, covenants and agreements, to be made, kept and performed by said vendees as hereinafter contained and specified, do hereby agree to sell and deliver to the vendees, and the vendees hereby agree to buy, 'All of the lumber now owned by the vendors in pile at their saw mill yard at Fletcher Spur, near Pablo, Flat-head County, Montana, and all lumber to be sawed, cut and manufactured by them at such Fletcher Spur saw mill hereafter until the 1st day of January, 1921.

"And it is hereby mutually agreed and understood by and between the parties hereto, as follows, to-wit:

"1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per thousand feet on all lumber hereby sold and in pile at Fletcher Spur, in accordance with an inventory this day agreed upon; that the vendees shall also loan to the vendors hereon the sum of \$20,000.00, which shall be evidenced by a promissory note of the vendors, and which shall bear interest at the rate of seven per cent per annum from this date until paid as hereinafter specified; and that the vendees shall also pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be hereafter sawed, cut and manufactured by the vendors under and during the terms of this contract, which payment shall be made monthly, based upon an inventory of finished piles in the mill yard taken on or before the 10 day of each month, providing, however,

that \$10.00 per thousand feet of such advancement shall be applied and credited on the \$20,000.00 promissory note above mentioned, until the principal and interest thereof is fully paid. That the advancement this day made shall bear interest at the rate of seven per cent (7%) per annum from this date, and all other advancements to be made as herein specified shall also bear interest at the same rate from and after the date the same are made and until paid; and such interest shall be computed and adjusted monthly, on or about the 10th day of each month, based upon the balance thereof remaining against the vendors, after deducting such advancements from the sale price on all shipments made, as hereinafter provided.

“2. That the vendors shall manufacture and grade said lumber according to the Western Pine Manufacturers Association grading rules and standards, and shall protect and hold the vendees harmless against any claim or loss which may arise under said rules or standard.

“3. That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees.

“4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced on said lumber as hereinbefore provided, which draft the vendees agree to honor and pay when presented.

“5. That upon the payment of the advance of \$20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the

balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and bill of sale given.

“6. That in the event of a failure on the part of the vendors to carry out this contract, the right is hereby given to the vendees to use the planer of the vendors at said Fletcher Spur to dress the said lumber in order to protect themselves against loss on account of the amounts advanced hereunder.

“7. That the vendors hereby lease to the vendees for and during the life of this contract the land upon which said lumber yard is or may be located at said Fletcher Spur, but the vendors may retain the right to occupy and use the same for the purposes of this contract.

“8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the loss thereon to be made payable to the vendees.

“9. That this contract and every provision thereof shall extend to and be binding upon the successors and assigns of the respective parties hereto.

“In witness whereof, the said parties have hereunto set their hands and seals this 16th day of April, 1920.

DONLAN & HENDERSON,
By BEN W. HENDERSON.
TURNER, DENNIS & LOWRY
LUMBER COMPANY,
By THOS. S. DENNIS,

Secy. & Treas.

Attest.....,

Secretary.

Thereupon appellee paid appellants in drafts the sum of \$60,000.00 and appellants gave appellee their two promissory notes for \$10,000.00 each, dated April 16, 1920, one due in three months and the other due in four months from date (Tr. 207-208), leaving \$40,000.00 as an advancement to be repaid with interest at 7% from proceeds of sale after deducting appellee's selling commission of 15% and other marketing expenses.

Under date of April 16, 1920, appellants further executed to appellee Plaintiff's Exhibit 1 as follows (Tr. 135):

BILL OF SALE

"Know all men by these presents: That we, Donlan & Henderson a copartnership of Pablo, Montana, the parties of the first part, for and in consideration of the sum of One Dollar, lawful money of the United States of America, to them in hand paid by Turner, Dennis & Lowry Company, a corporation, of Jackson County, Missouri, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said party of the second part, its successors and assigns.

"All the lumber now owned by us (Donlan & Henderson) in pile at our saw mill lumber yard at Fletcher Spur, near Pablo, Flathead County, Montana, containing approximately Two Million (2,000,000) board feet.

"This bill of sale is given, however, subject to our vendors' lien upon all of said lumber, for balance due thereon from said parties of the second part to the parties of the first part, according to a certain contract of sale, entered into between said parties on this 16th day of April, 1920.

"To have and to hold the same, to the said parties of the second part, its successors and assigns forever; subject, however of the vendors' lien before mentioned, and we do for our heirs, executors and administrators, covenant and agree to and with the said parties of the

second part its successors and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made, unto the said parties of the second part, its successors and assigns, against all and every person whomsoever, lawfully claiming or to claim the same.

“In witness whereof, we have hereunto set our hand and seal the 16th day of April in the year of our Lord one thousand nine hundred and twenty.

DONLAN & HENDERSON (Seal)

By E. DONLAN (Seal)

E. DONLAN (Seal)

BEN W. HENDERSON (Seal)

“Signed, sealed and delivered in the presence of:

A. J. VIOLETTE.”

On June 28, 1920, appellee paid appellants \$20,000.00 in two drafts, one for \$15,000.00 and one for \$5,000.00, of which \$8,917.76 was advanced on 891,776 feet of lumber, to be repaid to appellee with interest at 7% from proceeds of sale after deducting appellee's selling commission of 15% and other marketing expenses. The balance of \$11,082.24 was loaned to appellants with interest at 8% according to the supplemental agreement of June 28, 1920, set out on page 213 of the transcript, and appellants gave appellee a note for \$6,082.24 due September 1 and a note for \$5,000.00 due October 1. (Tr. 212). On June 28, 1920, appellants also executed and delivered Plaintiff's Exhibit 2, which “conveys from Donlan & Henderson, for a consideration of \$8,917.76, to Turner, Dennis & Lowry Lumber Company, 891,776 feet of lumber in yard at Fletcher Spur, Flathead County, Montana.” (Tr. 137).

On August 3 appellee further advanced to appellants, to be repaid by them with interest at 7% in the manner above described \$20.00 per thousand feet on 446,636 feet of lumber by paying appellants a draft for \$4,466.36 and apply-

ing a like amount on appellants' unpaid notes (Tr. 216). And on that date appellants also executed and delivered Plaintiffs' Exhibit 3, which "conveys from Donlan & Henderson, for a consideration of \$4,466.36, to Turner, Dennis & Lowry Lbr. Co.

"446,636 ft. a \$20.00 /M	\$8,932.72
Less \$10.00 /M	4,466.36
	<hr/>
	\$4,466.36

now being in the County of Flathead, State of Montana, the date of the bill of sale being left blank."

So far as appears from Exhibits 2 and 3 they evidence an absolute sale at the prices named and fully paid and show on their faces that nothing more was to be paid by appellee to appellants for the lumber described in them, but Ben W. Henderson testified orally that the lumber was delivered and sold under the contract of April 16, 1920. (Tr. 138). The total quantity described in Exhibits 1, 2 and 3 is 3,338,412 feet, it was stenciled with appellee's name, and all of it except ten cars theretofore shipped and one car then on the track was destroyed by fire on August 3, 1920 (Tr. 138-139, 224).

It was understood by the parties to this suit that appellee's interest was to be insured for \$25.00 per thousand feet of lumber on which advancements were made and that all other risk of loss was assumed by appellants.

Thomas S. Dennis testified as follows:

"I am not certain whether the discussion for the insurance came up before I went to Pablo or after my return, but prior to the general conference in Mr. Violette's office in which the contract was drawn up I

told the Senator we would have to be protected for our advancements by the insurance, and he said that was all right, and I said we would expect \$25 a thousand protection, and he said, 'What is the \$25 a thousand for; you are only advancing \$20 a thousand?' I explained to him that in an operation of this kind anticipating a run of several months or indefinitely, we could not afford to tie up the heavy proportion of our capital in such an operation and devote my time and our western representative's time to the operation and put other items of expense into the handling of their operations before the lumber was in shipping shape and then have it all burn up and not have any manner in which we could recover the expenses we had invested." (Tr. 202).

The contract referred to is above set out and contains this clause:

"8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the loss thereon to be made payable to the vendees."

Ben W. Henderson testified:

"This lumber was insured under our contract. We had \$70,000 insurance which we placed with the old line companies the time we purchased the lumber; and we had the \$6,000 placed with the Inter-Insurance Exchange, of Seattle, Washington; that we placed later and put it on as our yard filled up. In the first place we bought 2,000,000 feet of lumber from W. H. Smead, and when we made the purchase we insured it for \$70,000, the price we paid for the lumber. That was on the 15th day of April, 1920. That insurance policy is in the bank; I surrendered it when I made our proof of loss. There was \$20 per thousand feet made

payable to Turner, Dennis and Lowry, as their interest might appear, and as our interest might appear. The rest was made payable to us as our interest might appear. This second policy for \$60,000 was taken out at intervals as the lumber increased in the yard when it was sawed. Our bookkeeper always ordered this insurance by telephone. The order was given to Mr. De Veuve, at Seattle, Washington, telephoned or wired by our bookkeeper. There was no provision made in that policy as to payment of insurance; it was payable to Donlan and Henderson. That was absolutely unintentionally inserted in there; it never occurred to me that they were not named in it until we went to make the proof; that was an oversight." (Tr. 141-142).

Ed Donlan testified as follows:

"When I talked with Mr. Dennis about what our agreement was to be, I didn't object to this \$25 a thousand insurance. I knew Mr. Violette had put that in the contract. I first objected to that when they came in and demanded \$5 a thousand profit after we losing the lumber, after sustaining our loss, they demanding their profit before we were getting anything. It would be all right if they paid us for the lumber in the first place and then took their profit; I wouldn't have objected to it. I understood every part of that contract fully." (Tr. 376).

In other parts of the testimony Donlan and Henderson speak of the \$5.00 difference between the \$25.00 a thousand mentioned in clause 8 of the contract and the \$20.00 a thousand advanced by appellee on the lumber destroyed as a profit or bonus, and they objected to it for the reason that appellee had only an interest of \$20.00 per thousand in the lumber.

Henderson admits that he collected \$70,000.00 of insurance on September 29 and \$60,000.00 more in October, that they made proofs of loss and signed articles of subrogation. (Tr. 154). In a letter to appellee dated August 30 he said:

“We had no insurance on logs, had \$130,000 on lumber. Our figures show that we were \$35,000 underinsured on lumber. The adjusters made no protests. We have filed our proofs of loss and should be getting some money soon.” (Tr. 156).

Upon being questioned he said that when he said, “we were underinsured” he referred to Donlan and Henderson. (Tr. 157). On page 362 he said further:

“As to the reason why I was \$35,000 underinsured, I recall that Mr. Daly, the representative of the Inter-Insurance Exchange, was there, a few days, I think, before the fire—not over a week before; he came around regularly to inspect the yard, and he asked me to take out more insurance at that time, and told me I was underinsured, and I told him that I didn’t think I would at that time, that we expected to take a little chance along with the rest of them, and couldn’t give it all to them fellows, or something to that effect. I intended to take out some, but I was a little too late; I intended to take out more.” (Tr. 362).

The insurance coming to appellee at \$25.00 per thousand feet of the lumber destroyed amounted to a little over \$75,000.00. Donlan received \$10,000.00 from the Inter-Insurance Exchange and later when Dennis was in Missoula he received \$70,000.00 of insurance from the old line companies and paid Dennis \$60,000.00 of this and promised to pay the balance when the rest of the money should come (Tr. 228). Dennis testified:

“When I was in Missoula Senator Donlan told me

the balance would be paid with the remaining insurance money as soon as it was received, and Mr. Henderson made the same statement when I was at Pablo. I know only in a general way when these subsequent insurance monies were received by them." (Tr. 231-232).

Under date of October 28, 1920, appellee sent Donlan & Henderson, the following telegram:

"Inter-Insurance Exchange advise forwarded you twenty thousand Tuesday our financial requirements are very urgent and pressing and we trust you will forward this amouunt to us quickly will greatly appreciate your co-operation kindly wire us definite advice." (Tr. 234).

In reply to which Donlan wired appellee under date of October 30, 1920, as follows:

"Nothing rec-d to date from Inter Insurance Exchange Seattle will forward soon as get it Will advise you." (Tr. 234).

We will now go back to the course pursued by the parties in marketing the lumber. Ben W. Henderson testified:

"Then we were to stencil the lumber in their name and to load it and ship it according to their instructions. When we got orders we were to plane whatever we got orders to plane. We were to plane it, load it on the car and ship it according to their orders." (Tr. 143).

Referring to the invoices from Donlan & Henderson to Turner, Dennis & Lowry Lumber Company which were made by appellants as the various cars were shipped, Henderson said:

“They were to have the 15% for selling; each one of them was marked “less 15% commission.” As a matter of fact, that is what Turner, Dennis & Lowry got out of the deal, 15% commission, whatever they would sell the lumber for.”

“As to whether I knew what they would be able to get for this car load of lumber, the first car load of lumber, if I remember right, we had the price on that. Now, they were unable to get us very many cars, it seems, but after they finally began to give us orders—I think the first two cars of regular shipments were also put on that kind, and generally they would put up a load of orders that were transit orders, that were not desirable, but we loaded first on transit orders, which were handled in this way: They would telegraph us to ship a car load to Alliance, Nebraska; we would ship it; then they would divert it to a customer they found while the car load was en route, collect the amount, retain the \$20 per thousand they had advanced us, retain their 15% commission, and we would get the balance. They were all handled the same way. All the lumber that was shipped by us, they were supposed to find the purchaser, take out the \$20 a thousand and the 15%, and deliver to us the balance, less the freight.” (Tr. 143-144).

Under date of May 17, 1920, the appellee wrote Donlan & Henderson as follows:

“We have your favor of May 8th, enclosing the memorandum of stock on hand in the shed and planing mill. We are glad to have this, and will make up orders in the next few days to cover this stock, so you may get this out of the way.

“We have been waiting a few days before sending you orders for the No. 4 boards, thinking that the market would indicate more clearly just what could be expected in the next several weeks, but so far there is no disposition for conditions to settle down to a more stable basis. The market is quite badly upset with quite a wide range of prices being quoted.

"We will send orders to you during the next few days for several cars of No. 4 boards, and we believe it would be just as well to get some of this low grade stock in consumption now, rather than hold it against possible advances of the market which might not materialize." (Tr. 217-218).

A letter from appellee to Donlan & Henderson dated June 9 contains the following:

"Please let us know just as soon as you want orders, as we want to keep the Planing Mill fully occupied when you finally get to the place of taking on business.

"The market is in such a deplorable condition at this time that we are not disposed to hasten the issue in any way, as we look for a stronger price situation a little later on than now prevails, but of course when you get ready to start shipping, you want to continue operating, and we want to be sure that you have orders on hand to take care of your full running time." (Tr. 218-219).

The following letter by appellee under date of June 17 accompanied the first order:

"We are enclosing our order 616-D car of No. 4 Western White Pine S2S at \$51.00 Elwood City, Pa. This is sold at a good high price. It isn't very often that we can get an order at such a high price as this but we are giving you full benefit as per our agreement on the sale of this stock. What we want now, is a large car and prompt shipment, therefore please get this order out at once and oblige." (Tr. 220).

The invoice for this order is abstracted on pages 144 and 145 of the transcript as follows:

"Also an invoice from Donlan and Henderson to Turner, Dennis & Lowry Lbr. Co. dated July 1, 1920,

for 28,884 feet, \$1471.04, less 15% commission \$220.65, net \$1250.39. marked Sold to Monongahela Lbr. Co., Elwood City, Pa.' "

Under date of June 16 appellants wrote appellee a letter containing the following:

"I am in receipt of your letter of the 9th inst. * * * You, no doubt before now have received our request for orders, on receipt of which we will start the planer immediately. We have lost no time sawing." (Tr. 221).

Under date of June 18 appellants wrote appellee as follows:

"We are in receipt of yours of the 14th inst., and note what you say of the present market condition, and of a likely improvement within the next thirty days.

"There is nothing that we particularly desire to move at this time, and in the matter of orders; we are leaving that entirely in your hands. While we are anxious to get things moving towards steady shipments, we do not care to ship anything that would not justify us, and do not want to make any sacrifices just to ship at this time.

"You are in constant touch with the eastern market, and based on that, and if you think that there is anything particularly that we would be justified in shipping send us the orders."

Under date of June 25 appellee wrote appellants as follows:

"We have your letter of June 16th and 18th.

"We are certainly glad to know you feel disposed to leave the matter of sales in our hands, as we assure you that we have your interest as much or more at heart than our own. We could sell some stock at present by

forcing the issue, but the market is almost dead; and practically the only stock that is being sold is an occasional order which fits some customer's immediate requirements.

"There is a little speculative buying being done, but only at ruinous prices, and prices which we do not feel disposed to meet unless under pressure.

"We are quite anxious to realize on some of the funds which we have tied up in our various contracts, but we feel that we are serving our Mill connections best by not pushing their stock too hard on the present market." (Tr. 222).

In a letter dated July 24 appellants referred to a previous letter in which they had notified appellee their mill would shut down to install a blower and explained that they had been delayed in getting some blower parts and had been shut down longer than they had expected but that they then planned to start planing again in a few days (Tr. 169).

Ten cars were shipped before the fire and one car that escaped the fire was shipped afterward, making a total of eleven cars that were shipped (Tr. 223). The invoices from Donlan & Henderson to Turner, Dennis & Lowry for these cars are abstracted on pages 144, 145 and 146 of the transcript. They all show that the lumber was sold by Turner, Dennis & Lowry Lumber Company for a commission of 15% and some of them contain the notation made by plaintiffs: "Sold on consignment basis less 15% commission."

We have tried by this statement to place before the court in convenient form those facts which we think present the issues to be determined in this appeal. The failure of the appellants to sustain by proof the grades and quantities of each grade of which they say the lumber destroyed by fire of August 3, 1920, consisted, their failure to prove by any evidence that the value of the lumber at that

time destroyed exceeded the insurance carried by them, the accounting by which the debt from appellants to appellee was arrived at, and the conduct of the parties under the contract in regard to the lumber cut after the fire, are matters which we will consider in another place.

The decision of the trial court and the judgment will be found on pages 112 to 126, inclusive, of the transcript of record. The decision of the court will also be found at page 71 of volume 275 of The Federal Reporter, where the case is reported.

BRIEF OF THE ARGUMENT.

I.

On page 118 of the transcript the trial court said:

“The consequences are clear. As owner of the lumber burned, defendant loses its investment therein and its prospective profits, but indemnified to the extent of the stipulated insurance of \$25.00 per M feet, and as owner of the lumber not burned, it is obligated to resell in accordance with the contract. In respect to neither is it entitled to recover from plaintiffs any of the \$20.00 per M by it paid. Nor are plaintiffs entitled to recover what they might have received had the lumber been resold before burned. They sold it to defendant for \$20.00 per M and its promise to resell, whereupon if for a price in excess of the amount due defendant by virtue of the contract, viz., \$20.00 per M plus 17% of the resale price, defendant would pay the plaintiffs the equivalent of such excess. Before resale, no money was due plaintiffs, no debt to them existed. If resale was for an excess price as aforesaid, money would then be due plaintiffs, a debt to them would then be created. The happening of resale alone would determine what, if anything, was due plaintiffs, the amount, and the time of payment. Defendant’s promise to pay was not absolute, but was conditional and plaintiffs’ right to payment was not vested but was contingent.

“By reason of destruction of the lumber the condition failed, the contingency did not happen, and both the promise and the right expired.

“For in these circumstances the law is that the failure of the event to happen without fault of the promisor, prevents creation of a money debt, terminates the promisee’s expectancy of payment, and excuses failure to perform the promise.”

This statement by the court appears to contain the substance of all that to which appellant's assignment of error and argument are directed.

The ruling and result in this case are supported by an overwhelming weight of authority, even assuming, as the trial court assumed, that the absolute property in the lumber had vested in appellee and that the transaction resulted in a sale for resale and not an agency or factor's arrangement by which, as appellee contended at the trial, the title passed to appellee as security with an interest in the lumber similar to the ordinary factor's lien to secure advances.

Appellants have confused this case with those in which the purchase price is immediately payable but is to be determined by weighing, measuring, testing, counting, inspecting, etc., and the act which will determine the amounts immediately payable has become impossible by the perishing of the goods to be sold. In those cases some courts have held that the purchase is complete and the debt may be created although the measurement has not been performed, and the measurement may be estimated from the best evidence then procurable. Without exception the cases cited by appellants involve situations quite different from those here presented and are quite wide of the mark.

Hatch v. Standard Oil Company, 100 U. S., 124, does not involve a question of lost or destroyed goods and merely presents a controversy as to whether, as against an attaching creditor, the title to certain staves had passed to the purchaser.

In *Noyes v. Marlott*, 156 Fed., 753, the sellers agreed to fell, cut, raft, drive, and deliver a certain quantity of

logs in the channel or slough of the Chena River. The purchaser agreed to provide in the slough departing from the Chena River the necessary boom for the arresting and detention of the logs and to remove them to the banks and at the time of such removal to scale them and pay for them. A drive of logs was put into the boom by the sellers and on the next day the river began to rise and the boom which had been provided by the buyer gave way and the logs remaining in the slough were swept down the river and lost. This court held that the buyer must pay for the logs. The features which distinguished that case from this are clearly recited in the opinion where you said:

“But everything the loggers, as sellers, had to do with the logs, was completed when they delivered into the slough. After delivery, their only interest was in recovering the price agreed upon when the measurement was ascertained by Noyes, the purchaser.

“A circumstance in the case to show that there was no condition in the sale is the fact that, after the logs in the first drive had been delivered into the slough, Noyes employed the loggers, defendants in error, to help him pull the logs onto the bank, and paid them daily wages for such service.”

In *Oil Company v. Van Etten*, 107 U. S., 325, the seller agreed to deliver barrel headings to be piled on the land of the buyer who was to furnish a man to count them, as they were from time to time piled, in order to obtain an approximate estimate of the quantity piled, and thus to determine the amount of advances to the seller under his contract, but the inspection and final count was to be made by an inspector appointed by the buyer at a point to which the latter shipped them. The property in the headings was to pass to the buyer on delivery of them on his land. There

was a difference between the quantity shown by the two counts and the court held that any evidence was admissible which tended to show the correctness or incorrectness of either count.

An examination of all of the cases cited will reveal a similar difference in facts and inapplicability as authority in this decision.

The trial judge ably sustains his decision in this case and we doubt if a more clear exposition of the principles applicable can be found. But we desire to call your attention to some features of the contract and to some additional authorities which demonstrate the correctness of his conclusion.

We will look at the obligations assumed by the parties under the terms of the written agreement. The appellants on their part were to do the following things:

(1) To manufacture and grade the lumber.

(2) To deliver the lumber F. O. B. cars at Fletcher Spur either dressed or rough as directed.

(3) To ship the lumber and render an invoice and bill of lading with draft, and,

(4) To insure the lumber for the benefit of the appellee.

The appellee's promises were:

(a) To advance \$20.00 per thousand feet as the lumber was piled, sawed and stenciled.

(b) To market and sell the lumber for the highest market price obtainable and pay to appellants such market price, less 15%.

While we have not named all of the obligations of the appellants, the two obligations of the appellee above named are the only ones which it assumed, the first, namely, to advance \$20.00 per thousand feet was carried out by the appellee. The second obligation, which the court will note was not to pay any money, but was to "market and sell said lumber", etc., was not performed so far as the lumber destroyed by fire was concerned because it became impossible thereafter for appellee to sell the same or any part thereof. The obligations of appellants above described were conditions of the contract and only the first one had been performed by the appellants. As the trial court so clearly expressed it (Tr. 118-119):

"For in these circumstances the law is that the failure of the event to happen without fault of the promisor, prevents creation of a money debt, terminates the promisee's expectancy of payment, and excuses failure to perform the promise."

The same rule is stated in *The Tornado*, 108 U. S., 342, at page 351, where the court said:

"On principle, this case falls within the rule that where the stipulations of a contract are interdependent, a defendant cannot be sued for the non-performance of stipulations on his part which were dependent on conditions which the plaintiff has not performed. The ship-owner was entitled to freight only for carrying the cargo and delivering it at Liverpool, with the implied covenant that this particular vessel was to take it on board and enter on the voyage. Before that event occurred this vessel was substantially put out of existence by no fault of the shipper, and he had and could have no benefit from the contract. He had a right, therefore, to treat the contract as rescinded, so far as any liability for freight was concerned. In *Taylor v. Caldwell*, 3 Best & Smith, 826, it is laid down

as a rule, that, 'in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.' The reason given for the rule is, that without 'any express stipulation that the destruction of the person or thing shall excuse the performance,' 'that excuse is by law implied, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.' The rule was there applied to excuse the owner of a music hall, which had been burned, from fulfilling a contract to let the use of it. The principle was extended further in *Appleby v. Myers*, L. R. 2 C. P., 651. There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract, and that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not. See Benjamin on Sales, 3d Am. Ed., Sec. 570; *Wells v. Calnan*, 107 Mass., 514, and cases there cited. These principles are so well established that it is only necessary to refer to one case in this court, *Jones v. United States*, 96 U. S., 24, which recognizes them, in which it is said:" Quoting.

Appellants rest their case on the theory that the loss follows the title and would have the court hold that there are no exceptions to that rule, whereas there are many cases in which exceptions have been applied. The reason is that the law of sales is a branch of the law of contracts.

A contract of sale is still a contract and is governed by the rules of contracts. One of the essential principles of the law of contracts is that parties may make what bargain they please. This is the statement of Judge Blackburn, an authority on the law of sales. 25 Halsbury, Laws of England, 204 note. Most of the rules of the law of sales are rules for ascertaining the intention of the parties. When the parties have made a particular bargain it must be enforced regardless of what the general rule may be. That the general rule emphasized by appellants is always subject to exceptions dependent upon the particular contract has been noted many times. Thus the Supreme Court, in *Elgee Cotton Cases*, 22 Wall. 180, at page 194, states the general rule and recognizes the exception:

“It must be admitted that when a contract of sale has transmitted the property in its subject to the buyer, the law determines, in the absence of agreement to the contrary, that the risk of loss belongs to him. This is a consequence of his ownership, though undoubtedly the property may be in one and the risk in another.”

And as a contract of sale is a contract, an action for the price of goods is an action upon a promise. Ordinarily a promise to pay the price becomes absolute upon the passing of title, but if the promise to pay is conditioned upon a contingency and that contingency does not happen, the promise to pay will not ripen into a debt. The trial court applied this rule to the facts of this case in the following language: (Tr. 120, 121)

“It will be conceded plaintiffs’ right to any payment and how much, depended upon resale for a price in excess of the amount due defendant as aforesaid, and it will be conceded that if values depreciated by reason of time, weather, borers, insects and the like, plaintiffs

would lose accordingly. That is, if because thereof the lumber resold for no more than due defendant as aforesaid, though worth more at time of sale, plaintiffs would be entitled to no payment from defendant.

And the same principle that in whole or in part would discharge defendant's promise in these circumstances of partial destruction of the lumber or of its value, in whole discharges it in the instant circumstances of fire and total destruction of the lumber. Both parties understood this and both insured. The 2000 M feet first sold to defendant, contemporaneously cost plaintiffs \$35.00 per M feet. They received \$20.00 per M from defendant, agreed to insure in defendant's interest for \$25.00 per M and did insure for \$35.00 per M the amount they had paid for the 2000 M. Later, they secured \$60,000.00 more insurance, aggregating on all (94) the lumber, \$55,000.00 more than the \$25.00 per M they agreed to carry for defendant on the lumber burned, and all of which they collected. That some of it was on lumber not sold to defendant, does not detract from the implication in respect to their understanding aforesaid.

It is urged by plaintiffs that as defendant paid them but \$20.00 per M for the lumber burned, and thereon claim the stipulated insurance of \$25 00 per M, \$5.00 thereof is profit which on some equitable principle it ought to share with plaintiffs even though secured by a resale of the lumber. This cannot be maintained. In any view of the parties' respective interests in the burned lumber, even as other co-owners each could insure their or its interest, without liability to share proceeds with the other."

Appellants do not sue for the balance of a purchase price agreed to be paid by appellee for the lumber which was destroyed by fire because there was no agreement that appellee should pay any purchase price. The agreement was that when appellee should procure purchasers for the lumber appellants should deliver it, dressed if required,

f. o. b. cars at Fletcher Spur, and that appellee should then pay to appellants the price for which it had sold the lumber to the customers, less 15%, less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced on said lumber. As we understand appellants' counsel they do not contend that appellants were creditors of appellee at the time of the fire; it was clearly the intention that such relation would not exist until the lumber should actually be sold by appellee to a customer. We understand their position to be that the title to the lumber had passed to appellee, that the loss follows the title and that by reason of the destruction appellee became liable to appellants by operation of law and that the destruction created a debt where there was none before.

This theory is conclusively refuted by the opinion of the court in this case, and, while we do not concede that the absolute title to the lumber passed the result must be the same whether the title was at the time of the fire in appellants or appellee.

The title may be in one and the risk of loss may be in another. The risk of loss may be, and was here, the subject of agreement. The intent must govern and it was not intended by the parties that appellant should pay appellants for any lumber that should be destroyed by fire. Any rules that might be applied in cases where the intention was otherwise or where there was nothing to indicate the intention are not applicable to the facts of this case.

In the *Elgee Cotton Case*, 22 Wallace, 180, l. c. 194, the court said:

“It must be admitted that when a contract of sale has transmitted the property in its subject to the buyer, the law determines, in the absence of agreement to the contrary, that the risk of loss belongs to him. This

is a consequence of his ownership, though undoubtedly the property may be in one and the risk in another."

We very earnestly and confidently assert that in this case there was an "agreement to the contrary" very clearly established by the writing, the conduct of the parties under it, and the construction they placed on it. Loss by fire was one of the things contemplated by the parties when they made the agreement and it was clearly their intention that in such event the appellee should be paid, out of insurance to be paid for by appellants \$25.00 per thousand feet to cover its loss and that appellants should either insure against or bear any loss which they might suffer. This is apparent from clause 8 of the writing, which is as follows:

"8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the loss thereon to be made payable to the vendees."

Mr. Dennis testified, that at the time of his agreement with Mr. Donlan he explained to him that, in addition to the money advanced by appellee and the interest that should accrue thereon, appellee would incur expenses in preparing to market the lumber and that its entire loss should be covered by insurance paid for by the appellants (Tr. 202). The sum of \$25.00 per thousand feet was fixed as a liquidation of appellees loss and it was clearly intended that all other loss should be borne by appellants. The conduct of the parties from the beginning to the end of their relations forces this understanding as an irresistible conclusion. Mr. Henderson testified that before the fire an insurance agent suggested that they take more insurance

and that he, Henderson, replied that they would rather take some chance of loss than to pay all of their money for insurance premiums. (Tr. 362) The entire conversation as related by Mr. Henderson clearly showed that he then understood that in event of fire the loss above the advancements made by appellee would fall upon the appellants. In a letter from one of the appellants to appellee after the fire they said "we were underinsured." (Tr. 156) When asked by his counsel whom he meant by we, he replied Donlan and Henderson. (Tr. 157) Mr. Donlan testified that he asserted to Mr. Dennis or Mr. Lowry, or to both of them, that he would never pay to defendant out of the insurance more than the amounts advanced by appellee with interest, but that he would pay appellee the amount of the advancements. (Tr. 374) He contended that appellee's loss was \$20.00 per thousand feet and that appellee's loss was all appellants were bound to pay. He understood then that under the agreement appellee's loss was to be covered by insurance and that all of the remainder of the loss, if any, must be borne by appellants. He understood that the balance of the insurance was all he would get from any source and he was trying to keep as much of that fund as he could find excuse to keep. (Tr. 228) If he had not understood that the risk of loss was upon appellants he could have had no object in claiming \$.50 of the \$25.00 per thousand feet he had agreed to carry for appellee; he would have claimed the right to take appellants' entire loss out of the insurance and pay appellee the balance. The appellants actually paid the appellee \$60,000.00 of the insurance and promised to pay what they owed appellee out of the remainder. (Tr. 228) During all the conversations and correspondence that followed the fire appellants never once

asserted that the fire loss should fall upon appellee, but, on the contrary, all that they did, all that they wrote and all that they said indicated that it was their understanding that the uninsured loss should fall upon the appellants. We say again that it is absolutely immaterial whether the title was in the appellants or in the appellee and that the rule of law, applied in some cases, that the loss follows the title, has no application here. The intention of the parties is manifest and the intention must govern. The only conclusion that can be drawn from clause 8 of the writing is that appellants should bear or insure against all loss by fire in excess of \$25.00 per thousand feet, but if the intention of the parties as shown by that clause is questioned the construction placed upon it by the parties will determine their intention.

In *Old Colony Trust Company v. Omaha*, 230 U. S., 100, l. c. 118, the court said:

“Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.”

In *Insurance Company v. Dutcher*, 95 U. S., 269, l. c. 273, the court said:

“The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former.

In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case."

In *District of Columbia v. Gallaher*, 124 U. S., 505, l. c. 510, the court said:

"We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

This understanding seems to us to quite naturally follow the arrangement that appellee should sell the lumber and account to appellants for the proceeds after taking out its advancements and commissions and other specified expenses. The status which now exists is exactly what the parties must have expected in event of fire. The legal effect of it is simple and the parties doubtless understood that as well.

The destruction by fire could not in itself cast an obligation on appellee to pay for the lumber and no such obligation existed independently of the fire. The conditions upon which appellee should become bound to pay appellants any money had not arisen at the time of the fire and it was not contemplated by the parties that they would arise at all in event of destruction of the lumber. No money has become payable from the appellee to the appellants under the terms of the writing relied on. Appellee has derived no benefit from the destroyed lumber and no obligation to pay for it arises out of natural justice. It was not contemplated that appellee would pay for the lumber as a purchaser. Any payments by appellee to appellants were

to be made out of sales after deducting railroad charges, appellee's advancements, appellee's commissions and other specified expenses. Appellee was not in default at the time of the fire.

Frank et al. v. Butte & Boulder Mining Co., 48 Mont., 83, a decision of the supreme court of the state in which the transaction took place, is in point. The contract there under consideration contained this clause:

"It is further understood and agreed that the said thirty thousand dollars so advanced and to be advanced by the said H. L. Frank, shall be repaid to the said H. L. Frank by the said company, out of the first earnings of its business, after deducting running expenses, which said earnings are to be computed and paid over at the monthly meetings of the board of directors of said company."

On pages 87 and 88, the court said:

"The contention of respondents is that the contingency mentioned in the contract that repayment should be made out of the net earnings of the company merely postpones the time of payment, and that upon the completion of a reasonable time the obligation becomes absolute and can be enforced, whether there were any net earnings of the company or not."

After considering the cases cited in support of this contention, the court said:

"Appellant relies upon cases which hold that a contingency, such as the one above used, affects the liability, renders the obligation conditional, and imposes upon the party seeking its enforcement the burden of showing that the contingency has happened or the condition has been fulfilled before recovery can be had."

The court then cites cases and considers the question and on page 90 says:

“The parties explicitly agreed that Mr. Frank should be paid from a special fund as rapidly as it should be accumulated. The meaning of the parties is not left in doubt. If it was their intention to create a general liability on the part of the mining company which would subject all of its property to seizure and satisfaction of Frank’s claim, why, then, should they say, in the portion quoted above, that Frank’s indebtedness was to be paid out of the first net earnings of the company’s business?”

The only material difference between that case and this is in our favor. There the obligation to pay in event the fund out of which payment was to be made should arise already existed, while here there could be no obligation upon appellee to pay appellants any money until appellee should sell the lumber in the market and place the customer’s order with appellants and appellants should dress the lumber, if required, and load it on the cars and a surplus of the selling price should then remain after deducting appellee’s advancements and commissions and the specified expenses. It is unnecessary to consider what would have been the effect if appellee had breached its duty as a selling agent; this action is not brought on that theory and the facts would not sustain it if it had been so brought.

The decision of the trial court is in line with the well established principle of the law of sales. In 25 Halsbury, Laws of England, at page 189, we find the following:

“When the contract expressly or by implication, provides that the price of the goods, or some part of it, shall be payable only if the goods arrive at their destination, or are actually delivered to the buyer, or on similar

terms, the risk during the transit attaches to the seller to the extent of so much of the price as is so contingently payable, although the property in the goods may have passed to the buyer."

Calcutta & Burmah Steamship & Navigation Company v. De Mattos, 32 L. J. Q. B. N. S., 322, and 33 L. J. Q. B. N. S., 214, is so similar in its facts, so well considered, and so ably elucidated that it should be controlling in this case. The principle is there made plain that each contract must be interpreted according to its own terms and that the mere fact that the title may pass to a buyer does not itself fix the buyer's liability to pay for the goods. In that case Blackburn, J., in the lower court, rendered the opinion which was finally adopted in the upper court as the basis for decision in the whole matter. His statement of the case is as follows:

"Leaving out those parts of the contract not relevant to the present dispute and stating the terms as they were finally agreed to in the very words of the letters, the contract is thus expressed: 'De Mattos is to supply the company with 1,000 tons of any of the first-class steam coals on the Admiralty list, obtainable at the port of shipment, the selection of the particular description to be at the company's option, delivered at Rangoon alongside craft, steamer, floating depot or pier as may be directed by the company's agent at that port, shipment to be before the 30th of June then next. The price to be 45s. per ton of 20 cwt., delivered at Rangoon; payment one-half of invoice value by bill at three months, on handing bills of lading and policies of insurance to cover the amount, or in cash under discount at the rate of 5£ per cent. at De Mattos' option, and the balance by the company's Rangoon agent's drafts on the company in London on completion of delivery at Rangoon.' "

The shipment was made, the policies of insurance and the bill of lading were delivered to the purchaser and half the purchase price was paid. The ship started on its way, encountered stormy weather, part of the cargo was thrown overboard and the balance of the cargo was necessarily re-shipped in another vessel. On arrival at Rangoon, the master of the latter vessel offered the coal to the purchaser on payment of the freight charges on the new vessel, which offer was refused, and the coal was later purchased by the company, the original purchaser, when the master of the second vessel put up the coals for sale at auction. There were two actions stated by consent without pleadings; one was brought by the company, the purchaser, to recover back from De Mattos, the seller, the amount paid as an advance on the coal and to recover damages for non-delivery as agreed. The other action was brought by De Mattos against the company to recover the balance of the contract price of the coal, or in the alternative to recover the value of the remainder of the coal which finally reached Rangoon.

The holding of the court was that neither party could recover from the other. In the course of numerous opinions, no judge held or indicated that De Mattos could recover from the company anything on account of the coal thrown overboard or the coal not delivered at Rangoon as agreed in the contract.

We believe that assuming the contract here in question to be a contract of sale and that the title here passed absolutely, and not as security only, the provisions of the two contracts are identical in effect.

The SUBJECT-MATTER of the De Mattos case was:
1,000 tons of any of the first-class steam coals on

the Admiralty list, obtainable at the port of shipment, the selection of the particular description to be at the company's option.

The subject-matter in this case was:

All of the lumber now owned by the vendors in pile at their saw mill yard at Fletcher's Spur and all lumber to be sawed, cut and manufactured by them at said Spur until the 1st day of January, 1921.

The DELIVERY PROVISION in the De Mattos case was as follows:

De Mattos is to supply delivery at Rangoon alongside craft, steamer, floating depot or pier as may be directed by the company's agent at that port; shipment to be before the 30th of June then next.

The delivery provision in this case was:

"3. That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees."

PASSING OF TITLE. The De Mattos agreement contained this provision:

"Payment one-half of invoice value by bill at three months, on handing bills of lading and policies of insurance to cover the amount, or in cash under discount at the rate of 5£ per cent., at De Mattos' option." Blackburn, J., held that the title passed to the company by virtue of the delivery of the bill of lading, and Cockburn, C. J., in Queens' Bench, and Earle, C. J., Willes, J., Channell, J., and Williams, J., in Exchequer Chamber also held that the property in the coals passed to the company on the shipment and delivery of the shipping documents.

The provision in the contract now before the court is as follows:

“5. That upon the payment of the advance of \$20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and bill of sale given.

The PROVISION FOR PAYMENTS in the De Mattos case was:

Payment one-half of invoice value by bill at three months, on handing bill of lading and policies of insurance to cover the amount, or in cash under discount at the rate of 5£ per cent. at De Mattos' option, and the balance by the company's Rangoon agent's drafts on the company in London on completion of delivery at Rangoon.

The payment provision in this case was.

“1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per thousand feet on all lumber hereby sold and in pile at Fletcher Spur, * * *; and that the vendees shall also pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be hereafter sawed.”

“4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber

under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced on said lumber has hereinbefore provided, which draft the vendees agree to honor and pay when presented."

The INSURANCE PROVISION in the De Mattos case was:

Payment one-half of invoice value by bill * * * on handing bills of lading and policies of insurance to cover the amount.

The provision in this case was:

"8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the loss thereon to be made payable to the vendees."

The most satisfactory opinion in the De Mattos case is that of Blackburn, J., in the lower court, which was repeatedly referred to and approved by the judges in the upper court, and whose conclusion and decision was finally adopted. After stating the rule of law that various circumstances had been treated by the courts as sufficiently indicating the intention that the price will not immediately become payable, on pages 329 of 32 L. J. Q. B. N. S., he said:

"I think this a very accurate statement of the law; and I think, therefore, that in construing this contract the *prima facie* construction is that the parties intended that the property in the coals vested in the company and the right to the price in De Mattos as soon

as it came to relate to specific ascertained goods; that is, on the handing over the documents; and the inquiry must be whether there is any sufficient indication in the contract of a contrary intention. As to one-half of the price, the balance, as it is called in the letters forming the contract, the intention that it should only be paid 'on completion of delivery at Rangoon' seems to me as clearly declared as words could possibly declare it; and consequently, I think, as to that half of the price no right vested in De Mattos unless and until there was a complete delivery at Rangoon. But, consistently with this, there might be an intention that there should be a complete vesting of the property in the goods in the company, and a complete vesting of the right to the half of the price in De Mattos; so as in effect to make the goods be at the risk of the company, though half the price was at the risk of De Mattos; so that the goods were sold and delivered, though the payment of half the price was contingent on the delivery. And this, I think, is the true legal construction of the contract."

And on pages 328 and 329 of the same volume, after speaking of two common cases in which the goods may be, first, at the risk of the buyer, and second, at the risk of the seller, he concludes:

"But the parties may intend an intermediate state of things. They may intend that the vendors shall deliver the goods to the carrier and that when he has done so he shall have fulfilled his undertaking so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that they shall then be both sold and delivered and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving; just as they might, if they pleased, contract that the price should not be pay-

able unless a particular tree fall; but without any contract on the vendors' part in the one case to procure the goods to arrive, or in the other to cause the tree to fall."

Just as in the De Mattos case the company was not liable for and did not promise to pay the balance of the purchase price except "on completion of delivery at Rangoon," the appellee in this case was not liable for and did not promise to make any further payment except upon delivery f. o. b. cars at Fletcher Spur, either dressed or rough, as directed and ordered; indeed, still another contingency must have happened in this case before appellee would be bound to pay anything more: The lumber must have been shipped and sold for more than the advancement previously made by appellee and the expenses of marketing. This was a contingency that might never happen, and no debt could arise from appellee to appellants until it should happen. On page 120 of the transcript the trial court says:

"It will be conceded plaintiffs' right to any payment and how much, depended upon resale for a price in excess of the amount due defendant as aforesaid. and it will be conceded that if values depreciated by reason of time, weather, borers, insects and the like, plaintiffs would lose accordingly. That is, if because thereof the lumber resold for no more than due defendant as aforesaid, though worth more at time of sale, plaintiffs would be entitled to no payment from defendant.

And the same principle that in whole or in part would discharge defendant's promise in these circumstances of partial destruction of the lumber or of its value, in whole discharges it in the instant circumstances of fire and total destruction of the lumber."

II.

On pages 9 to 14 of their brief counsel urge upon the court the principle that "when a person by his own contract unconditionally undertakes a duty, he is bound to perform it or take the consequences, notwithstanding any accident by inevitable necessity," and cite cases to this general effect.

When handling the sword of impossibility counsel appear to have forgotten that it has two edges. Turning to the contract in question we find that it imposes conditions on appellants which they had not performed. The contract requires that "the vendors shall deliver said lumber f. o. b. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees." This had not been done, and until it was done appellee was not required to pay appellants anything more than the \$20.00 per thousand feet which had already been advanced. Another condition imposed upon appellants and which they did not perform was that "the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced on said lumber." The obligation that would have been cast upon appellee if all these things had been done was to pay to appellants "the highest market price for which it is sold by them, less 15%" (Tr. 17). The parties on both sides had something yet to do before appellee could become obligated to appellants to pay them any money. All that is said by counsel in their brief concerning impossibility applies as well to the parties on one side as it

does to those on the other and leaves them in this respect exactly where the trial court left them. The following from *The Tornado*, 108 U. S. 342, l. c. 351, is applicable to this situation:

“On principle, this case falls within the rule that where the stipulations of a contract are interdependent, a defendant cannot be sued for the non-performance of stipulations on his part which were dependent on conditions which the plaintiff has not performed.”

Furthermore, appellants were in default in a condition to be by them performed, and which could have been performed by them before the fire. They did not comply in any particular with the insurance provisions of the contract. According to Henderson's statement he insured the two million feet of lumber purchased from Smead for \$70,000.00. which was the amount appellants paid for it, and made the sum of \$20.00 per thousand feet payable to appellee as its interest might appear (Tr. 142). The appellee was not even mentioned in the policies covering the new cut. Appellants say this was an oversight and an inadvertence and that they recognized the obligation to provide the insurance and their liability to account for what they had received (Tr. 142). This, however, does not help appellants in this action. One who fails to perform the conditions of a certain contract on his part and for that reason is debarred from bringing an action upon it, cannot save himself by saying, “My breach was an inadvertent one. I recognize my accountability therefor and by reason of my repentance and recognition of my obligation, I desire to recover from the defendant.”

Waite v. Shoemaker, 50 Mont. 264, l. c. 277;

Riddell v. Peck Williamson Co., 27 Mont. 44.

A debt will not arise under a contract until all of the conditions precedent have been fulfilled. If the contract had been that appellants agreed to sell and appellee agreed to buy certain lumber, then, of course, the title would have passed and the obligation to pay the purchase price would have arisen. But that is not the case here. Even assuming the contract to be as appellants allege, appellee did not promise to pay anything at the time title should pass or because title passed, the promise is absolutely a conditional one and the conditions precedent have not been performed by appellants. They cannot recover merely because the title passed to the appellee, because under the facts of this case the passing of title and the obligation to pay for the lumber were not co-incident by any means.

Appellee performed the requirements of the contract as far as it could. The trial court in its decision said: "Throughout the contract, market conditions were unfavorable, and both parties, in hope of improvement, acquiesced in few resales and shipments" (Tr. 115-116). The evidence and references to the transcript quite fully set out in our statement will clearly show appellee's anxiety to dispose of the lumber and get its money out of it as soon as practicable.

The interdependent obligations were upon the expectation that the lumber would continue in existence until it should be marketed and shipped. As we have seen, it was the intention that in event of fire the appellee should be insured to the extent of \$25.00 per thousand feet and that appellants would insure against or stand any loss that might come to them by destruction of the lumber. This carries with it the intention that parties on both sides should

be relieved from performance of some of the conditions of the contract in event of destruction of the property.

Dexter v. Norton, 47 N. Y., 62, l. c. 64, is applicable here; the court there said:

“But there are a variety of cases where the courts have implied a condition in the contract itself; the effect of which was to relieve the party when the performance had without his fault become impossible, and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract. For instance in the case of an absolute promise to marry, the death of either party discharges the contract because it is inferred or presumed that the contract was made upon the condition that both parties should live.”

* * *

“In *Taylor v. Caldwell*, 113 E. C. R. 824, A agreed with B to give him the use of a music hall on specified days for the purpose of holding concerts and before the time arrived the building was accidentally burned: Held that both the parties were discharged from the contract. Blackburn, J., at the close of his opinion lays down the rule as follows: ‘The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of the performance, arising from the perishing of the person or thing, shall excuse the performance’ and the reason given for the rule is ‘because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing.’ ”

III.

We believe there are reasons for affirming the judgment of the court in this case which are not stated or mentioned in the opinion which we believe are equally potent in arriving at the same result. The first ground which we will consider is that truly construed the contract was one of agency or a factor's agreement rather than a contract of sale. We believe that a fair construction is that the title to the lumber in question did not pass, except as security for an indebtedness owed to and advances made by appellee. This, we believe, is established by the instrument itself, taking all of its provisions together and considering them as a whole, and by the other evidence offered at the trial showing that the parties intended, understood and construed the contract and the bills of sale as passing title to appellee as security only and not otherwise.

So far as the use of the words "buy" and "sell", "vender" and "vendee" are concerned, there is a great mass of cases holding that the use of such words does not determine the character of a contract, but that an instrument is to be held to be one of sale or of agency solely by examining what the respective parties agree to do. Thus in *D. M. Osborne & Company v. Joslyn*, 99 N. W., 890, the parties called their agreement one of sale but the court held that the relation of principal and agent was created. The same thing was true in the case of *Wilcox & Gibbs Co. v. Ewing*, 141 U. S., 627. In the following cases and authorities attention is called to the fact that many agreements or instruments contain features or elements, some of which resemble a sale and some an agency, and in all of them it is stated that the matter is not to be determined according

to what the parties call their arrangement, nor is the question to be decided merely because some term or provision indicative of a sale may be contained in the instrument, but that the instrument must be read as a whole so as to determine whether taking it by and large one sort of relationship or the other is really created.

- Lindsey Lumber Co. v. Mason*, 51 S. 750 (Ala.);
Halleman v. Bradley Fertilizer Co., 32 S. E. 82 (Ga.);
Fleet v. Hertz, 66 N. E. 858 (Ill.);
Sturm v. Boker, 150 U. S., 312;
Heryford v. Davis, 102 U. S., 235; (called a loan, held a sale);
Hervey v. Locomotive Co., 93 U. S., 664; (called a lease; held a conditional sale or mortgage);
 Notes Ann. Cas. 1915 A. 601, 605; L. R. A. 1917 B. 626; 94 A. S. R. 241;
 Meacham on Agency, Secs. 48 and 2499;
 Meacham on Sales, Sec. 41;
 See also *Halbert v. Kellen*, 142 N. W., 962; (good general discussion);
Watkins v. Donnell, 179 S. W., 980 (Mo.) (Used the word "purchase" held an agency);
Ransom v. Wickerstrom, 146 Pac., 1041; (gave bill of sale. As against third person allowed to prove this was in aid of agency.)

In the case of *Osborne & Company v. Joslyn*, 99 N. W., 890, referred to above, the contract provided:

"The party of the first part sells and the party of the second part buys the Osborne Columbia Corn Har-

vesters listed within at price annexed, same to be paid with express charges or exchange."

The court said:

"It seems to us that the only proper construction to be placed upon the contract, taking it by its four corners, is that it created the relation of principal and agent between plaintiffs and defendant; and though by its terms it purports to sell the machines to defendants, it should be construed in the light of the entire document, surroundings and the situation of the parties, and in harmony with the evident purpose and intent of the parties entering into it."

In *Heryford v. Davis*, 102 U. S., 235, at pages 243 to 244, one of the cases cited above, the court said:

"What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account."

A good general discussion of the subject is found in the case of *Halbert v. Keller*, 142 N. W., 962, at page 967. In that case the court points out that there is no universal test to be applied as to whether a particular instrument creates a sale or a consignment for a sale and that the only proper method to determine what relationship is created is to take the whole of the provisions of the contract without reliance upon any particular clause and without reliance upon the use of the words "buy" or "sell."

Another interesting case is that of *Home Bond Company v. McChesney*, 239 U. S., 568, 60 L. Ed. 444, in which the agreement recited that the second party "shall buy from said first party all acceptable accounts tendered to it by said first party and pay therefor the face value thereof less the following discounts." Here follows a table of discounts. "That the second party shall pay 78 per cent on 30 day accounts (etc.) upon delivery to and acceptance by second party of such accounts duly assigned to the party of the second part; and the remainder, less discount and deductions taken by the debtor, shall be paid immediately after the collection of the account by the second party * * * The first party shall properly assign and deliver to said second party all accounts purchased, including the right of stoppage in transitu, either in the name of the party of the first part or in the name of the party of the second part (provided, however, the party of the second part shall not be charged with negligence in not making stoppage in transitu in any event unless thereunto requested by the party of the first part). If the merchandise named in the accounts should be refused or returned, for any cause, the title to such merchandise shall be and remain in said second party until such accounts are paid * * * Immediately after the purchase of every account hereunder, said first party shall make upon its book an entry showing the absolute sale of said accounts to said second party."

The Home Bonding Company, which is referred to as the second party in the agreement claimed title to those accounts in bankruptcy proceedings against the first party. The court held that these accounts receivable were not sold

but were merely transferred as collateral security for loans. The first paragraph of the syllabus recites:

“Accounts receivable were not sold but were merely transferred as collateral security for loans by contracts under which the transferee was to make advances on acceptable accounts purporting to be sold to it, but which the transferror was to and did collect, bearing all the expense in connection with such collection. The so-called purchase price, to-wit: the difference between the face of the accounts and the discount not being known until payment of the account.”

Coming then to the instrument in hand, we find, we believe, that most of the provisions therein contained show that there was an arrangement which more nearly resembled that of principal and factor than anything else. That the arrangement was substantially one whereby the appellee agreed to market and sell the lumber for the appellants, to make advances to the appellants in the nature of loans and to receive and accept bills of lading as security only is evidenced by the following provisions contained in the contract.

1. The advancements made shall bear interest at the rate of seven per cent per annum.
2. Advancements are to bear interest “*until paid.*”
3. Such interest shall be computed and adjusted monthly based upon “*the balance thereof remaining against the vendors.*” This, we think, shows beyond dispute that the parties regarded this as a debt from the plaintiffs to the defendant. If it were a payment on the purchase price, there certainly could not be any balance remaining against the plaintiffs.
4. The defendant “shall market and sell said lumber.”

5. The instrument provides for a commission of fifteen per cent to defendant for its services.

These are all provisions characteristic of a factor's or commission merchant's agreement. The other provisions of the contract touching the use of the land and the right to use the planer are as useful and applicable in the case of a factor's agreement as in the case of a sale. The other provisions of the contract providing for the delivery of bills of sale and the transfer of title and possession might be indicative of a sale but they are just as useful to a factor or commission merchant who makes advances on goods, and we believe that the whole tenor of this instrument shows that such was the purpose here. Clause 5 does not provide that absolute title shall pass, but it says title shall pass *subject* to the balance payable to the vendor. The commission merchant or factor always receives possession of the goods and where advances are made provides either expressly or otherwise for a lien for the advances and nothing more than this, we believe, was done in this case.

The arrangement here was substantially the same as that found in *Lindsey Lumber Company v. Mason*, 51 So. 750, in which the court said:

“From the contract it is necessarily inferable that the Canoe Mill Company operated a saw mill, the product being for sale; that this company was not financially full-handed nor favorably situated otherwise to promote the sale of the mill's product and to facilitate the collection of the proceeds of the sale thereof. On the other hand, the Lindsey Lumber Company was favored in these respects. In this state of circumstances the Lindsey Lumber Company engaged to furnish the Canoe Company orders ‘at current market prices, suitable to cut all of their (Canoe Com-

pany's) logs into,' for a stipulated period that was by mutual agreement extended, 'and to arrange for such financial assistance as the Canoe Company may require from time to time to operate the mill, to make all collections for timber and lumber, to render such assistance as may be possible in getting cars to move said lumber.' In consideration of these services, the Canoe Company contracted to pay to the Lindsey Company \$1 per thousand feet for all lumber cut and shipped, regardless of whether the orders were secured by the Lindsey Company or accepted by the Canoe Company without the service of the Lindsey Company. It was also provided that the latter class of orders should not be accepted so as to conflict with the filling of the orders of the former class.

When read in the light of the situation of the parties and of what was assumed as obligations on their respective parts, there can be no doubting, even, that the purpose and manifest common intent was to create a relation of principal and agent, and in no event to constitute the Lindsey Company a vendee of the cut of the mill. Aside from anything else, the employment of the word "orders," as therein contexted, put the matter beyond all cavil. Clearly the services in that regard contemplated the inducing of third persons to buy the product of the Canoe Company's mill. Other features, such as the stipulation for compensation for the services to be rendered by the Lindsey Company, obviously negative any intent whatever to sell the product to the Lindsey Company. The provision with respect to the current market price was inserted in the sole interest of the Canoe Company, and its evident office was to protect that company from orders, taken or received by the Lindsey Company, based on a price below the current market price. There is nothing in the instrument to warrant an insistence that a sale of the cut of the mill to the Lindsey Company was at all contemplated. The compensation to the agent is fixed by the contract at the sum of \$1 per thousand feet of the cut of the mill."

It is well settled by a large number of authorities that documents purporting to transfer title to property may be shown to have been given as security and not otherwise. In the case of *Cabrera v. American Colonial Bank*, 214 U. S. 224, 53 L. Ed., 974, the court said:

“The face of an instrument is not always conclusive of its purpose, in equity, extrinsic evidence is admitted to show that a conveyance absolute on its face was intended as security. The rule regards the circumstance of the parties and executes their real intention, and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance, notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be proved.”

That case is particularly interesting because in that as well as in the present case, the ordinary situation was reversed. Ordinarily the person who gives a bill of sale afterwards attempts to prove that it was given as security. But the rule works both ways as shown by the case just cited in which the party giving the bill of sale asserted that it was given as an absolute conveyance and as full payment of the debt, whereas, the party receiving the bill of sale asserted that it was merely given and accepted as security.

In *Western Union, etc., Mortgage Company v. Valley Bank*, 237 Fed., 45, this court states the general rule as follows:

“It has long been the settled rule that in courts exercising equitable jurisdiction it is admissible to prove by parol that instruments in writing apparently transferring the absolute title are in fact only given as security.”

Supporting the same principle we cite:

Colony Co. v. Omaha, 230 U. S., 118;
Topliff v. Topliff, 122 U. S., 131;
Knox v. Ninth National Bank, 147 U. S., 100;
Chicago v. Sheldon, 9 Wall., 50;
Hastings v. Fithian, 71 New Jersey Law, 311,
 60 Atlantic, 350.
Brick v. Brick, 98 U. S., 514, 5 Ruling Case
 Law, 388-389;
District of Columbia v. Gallaher, 124 U. S., 505.

In the last case, the court said:

“When in the performance of a written contract both parties put a practical construction upon it which is at variance with its literal meaning, that construction will prevail over the language of the contract.”

The bulk of the testimony given at the trial had to do with the acts which the parties did in performance of their contract, and an examination of that evidence discloses that both parties throughout the time that the contract was being performed and until this suit was brought understood and interpreted the contract as we have interpreted it in this subdivision of our brief. We will review the evidence with this question in view:

1. Appellants took out insurance on all of the new cut of lumber in their own names (Tr. 142, 150). This they now say was an inadvertence (Tr. 142, 388). The policies taken in the names of appellants alone were issued at different times, and the same inadvertence, if there was any, must have happened three different times. The policies were returned to appellants a considerable time before the fire occurred and no change was made in them.

2. After the fire appellants made sole proofs of loss in their own name and claimed a sole, absolute and exclusive interest in the property (Tr. 316-317). It is inconceivable that these proofs of loss should have been presented in that manner honestly if the appellants then believed that they had sold the lumber to the appellee or that it was appellee's lumber. And why did appellants sign articles of subrogation covering lumber which was not theirs if they actually believed at that time they had sold the lumber to appellee? (Tr. 318, 322).

3. Late in September, 1920, appellants collected an insurance draft for \$70,000.00 and paid \$60,000.00 thereof to appellee (Tr. 228, 371). This was long after the fire had occurred. So far as the lumber destroyed by fire is concerned, the situation of the parties was just the same then as it is now. This fact not only shows that at that time Donlan & Henderson construed and interpreted the contract as we here interpret it, but it actually constitutes a presumption under the law of Montana. Section 10606 of the Revised Code of Montana makes it a presumption that money paid by one to another was due to the latter. It cannot be questioned, we believe, that at that time, when, as we have stated, the situation with regard to the lumber lost by fire was the same as it is now, appellants understood that they owed the appellee not only \$60,000.00 but also more money than that. We believe that if there were no other evidence in the case touching the construction of the contract by the parties than the evidence of this \$60,000.00 payment, it alone would be sufficient to determine the issues in this case in favor of the appellee. Donlan & Henderson cannot say that at the time when they paid us \$60,000.00 they then believed that we had purchased this lumber and owed them \$85,000.00 for it.

4. Henderson said in a letter: "We were underinsured," and on examination said that by we he meant Donlan & Henderson. He says that he told an insurance agent who solicited him for more insurance that he "expected to take a little chance along with the rest of them, and couldn't give it all to them fellows." (Tr. 362). This shows where Henderson understood the loss would fall in case of fire.

5. Donlan & Henderson, as well as some of the witnesses for the appellee, testified repeatedly (Tr. 361, 374, 376) that after the fire Donlan & Henderson, on each occasion when the matter was discussed, said that they did not understand, or had not understood, that defendant was entitled to the extra \$5.00 per thousand feet of insurance money. Dennis testified that Henderson said that he could see how Dennis might put that construction upon the contract, but that if he had understood the contract that way he would have taken more insurance (Tr. 230). Henderson did not deny this conversation. This demonstrates that at that time Donlan & Henderson conceded that all other sums, outside of the \$5.00 per thousand feet, claimed by appellee, were due to appellee. If at that time either Donlan or Henderson had supposed that they had sold the lumber destroyed by fire to appellee, they would not have limited their dispute to \$5.00 per thousand feet. The fact is that at no time prior to the commencement of this action was there any difference between the parties except this \$5.00 per thousand feet and a few small items of interest on advances, demurrage and freight returns.

6. The evidence shows without contradiction that in November, 1920, appellants gave appellee a statement (Tr.

152) showing that appellants owed appellee a sum of money. The statement shows that no interest is computed on the advancements, but it surely demonstrates that as late as that date Donlan & Henderson did not think or believe that appellee was indebted to them on account of the lumber destroyed by fire.

7. When Donlan paid appellee \$60,000.00 just before the first of October, he said that he was going to keep \$10,000.00 of that for himself and that he would pay the balance when the later insurance returns came in (Tr. 228). The correspondence in evidence shows that towards the latter part of October appellee inquired of appellants whether the insurance money had been received (Tr. 231). Appellee sent a telegram on October 28 (Tr. 234) inquiring about a collection of insurance from the Inter-Insurance Exchange; Donlan replied by telegraph (Tr. 234); "Nothing need to date from Inter Insurance Exchange will forward as soon as received."

8. The evidence absolutely fails to disclose any suggestion or request on the part of the appellants that appellee pay for the destroyed lumber. This is significant in many ways. It discloses most emphatically that up to the time of the institution of this action appellants did not consider that appellee owed them any money and also raises the question whether in any event any recovery can be had against the appellee without proof of a demand.

All of the evidence demonstrates that the parties themselves had the intention all of the time to deliver their bills of sale as security only, and that that was their construction of the contract throughout.

This view of the case leads to all of the results of the decision of the trial court and the judgment of that court that the defendant is the owner of 1,615,786 feet of lumber manufactured by plaintiffs since August 3, 1920, and upon which defendant has advanced and paid \$20.00 per thousand and for which defendant has received bills of sale, and that such lumber is the property of defendant subject to the contract described in the pleadings herein, and that the defendant have and recover judgment against the plaintiffs and each of them for the sum of \$18,221.17 (Tr. 126), should be affirmed.

IV.

The judgment of the court below must be affirmed because there is a fatal variance between appellants' complaint and the proof.

We believe the variance is so obvious and clear that citation of authorities is not required to demonstrate that it exists. The complaint contains five counts. The fifth count was abandoned at the trial and no proof was offered in support of it. The fourth count alleges the refusal of appellee to make a certain payment or advance of \$13,994.44 and this count is inconsistent with the main claim of appellants. There was no proof in support of the third count nor any contention made in its behalf, and the only counts of the complaint upon which appellants have relied are the first and second, which are substantially the same, the second being a more elaborate wording of the first.

The first count alleges a sale and delivery of the lumber of the value of \$149,447.22; a promise to pay a reasonable price of said lumber within a reasonable time, that a rea-

sonable time has elapsed and that a balance is due the appellants, payment of which has been demanded but refused.

The proof discloses no such sale, contract or promise. The evidence shows that the parties entered into a written agreement of a rather elaborate character in which the appellee did not promise to pay a reasonable price for any lumber or to pay any price at all, but in which the appellee promised to do certain things and make certain sales and remit the proceeds thereof, which were to be determined and calculated in a particular and rather elaborate manner, with commissions deducted, and the like. We respectfully submit that the proof of such a contract as this does not in any way sustain or support the allegations of the complaint. The court was, therefore, under obligation independently of any other conclusions that may have been reached to find that appellants could not recover on their complaint and to dismiss it and to render judgment for the appellee for the amounts which the appellee showed were due it.

V.

The trial court must necessarily have found against appellants because their proof wholly failed to support a cause of action. In order to recover upon any theory advanced by appellants it would be necessary for them to prove the value of the lumber in question. It was admitted that approximately \$130,000.00 of insurance money was collected by appellants and appellants conceded this must be largely credited to appellee. (Tr. 356). There is no evidence in the record to show that the lumber had any value over and above the amount of this credit.

Appellants offered in evidence what they referred to as bills of particulars. (Tr. 174, 185, 190). One of these

covered 2,000,000 feet of lumber and another some 1,338,412 feet. The 2,000,000 feet represented, or purported to represent, lumber cut and in piles at the time the contract was made, while the balance of the lumber was supposed to have been cut after the contract was made. There is absolutely no evidence that any of these lists correctly or properly showed what lumber was on hand. No one testified that they were made from a check of the lumber. There is not a word of testimony in the record that these bills of lumber represented the lumber which Donlan & Henderson owned at Pablo. Certain witnesses did testify as to the value of the items shown on these lists. But the origin of the lists and their correctness were never testified to by any one. At pages 140 and 141 of the transcript appear a question and answer which is absolutely the only thing in the record touching the value of the lumber in question. The explanation of the witness preceding the question shows that if Mr. Juneau ever mentioned any price of lumber it was done wholly without reference to any fixed or definite lumber and without reference to the stock of lumber which may have been on hand in the yard of Donlan & Henderson. Furthermore, the question was objected to by appellee, and the objection was proper unless further evidence to lay a foundation should be received, and that the foundation never was established and accordingly the answer, even if it were of any value otherwise, must have been discredited by the court.

The witness Juneau at page 296 tells exactly what he did, and all that he did in the premises was to hand Mr. Henderson the card of lumber prices prevailing at that time. (Tr. 360).

The result is that there is no evidence in the record to show that the lumber in question had any value what-

soever over and above the admitted credit to which appellee would be entitled. The court must therefore necessarily have been unable to find any judgment for the appellants on any theory and would be forced to the conclusion reached that the appellants' action must be dismissed and the appellee have judgment upon its counterclaims.

We respectfully submit that the appeal should be denied and the judgment of the trial court in favor of the appellee should be affirmed.

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fendant and Appellee.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

WONG DOT,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration,
Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

FILED

MAR 4 - 1922

F. D. MONCKTON,
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United States
Circuit Court of Appeals
For the Ninth Circuit.

WONG DOT,

Appellant,

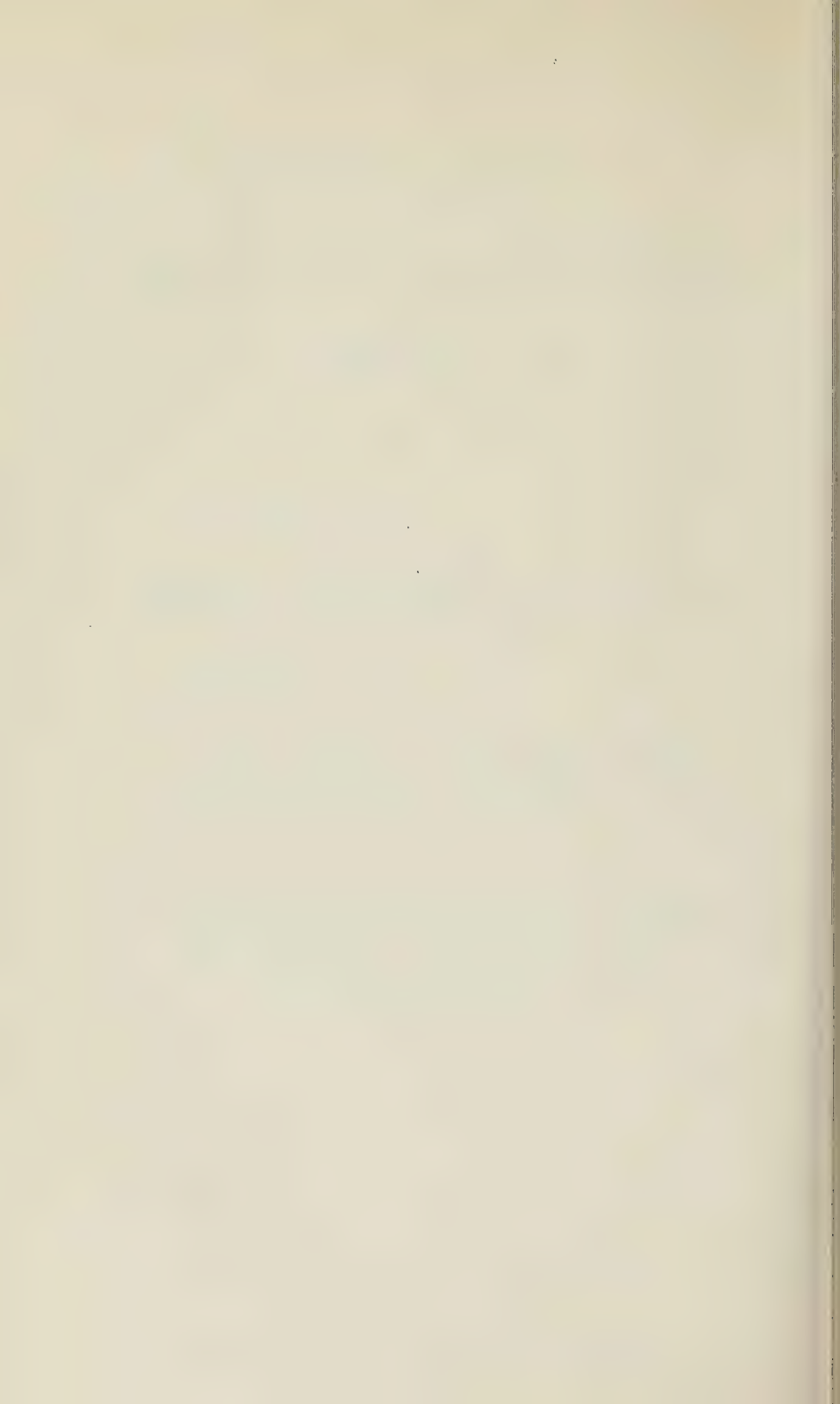
vs.

EDWARD WHITE, as Commissioner of Immigration,
Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Petitioner and Appellant:

JOSEPH P. FALLON, Esq., San Francisco,
Calif.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Fran-
cisco, Calif.

In the Southern Division of the United States Dis-
trict Court, for the Northern District of Cali-
fornia, First Division.

No. 17,361

In the Matter of WONG DOT (OT), on Habeas
Corpus.

Praeceptum for Transcript of Record.

To the Clerk of said Court:

Sir: Please make copies of the following papers
to be used in preparing transcript on appeal:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Demurrer to Petition.
4. Minute Order Regarding Immigration Record.
5. Judgment and Order Dismissing Order to
Show Cause and Denying Petition for Writ.
6. Notice of Appeal.
7. Petition for Appeal.
8. Assignment of Errors.
9. Order Allowing Appeal.

10. Stipulation and Order Regarding Immigration Record.

11. Clerk's Certificate.

12. Citation on Appeal—original and copy.

JOSEPH P. FALLON,

Attorney for Petitioner.

[Endorsed]: Filed Feb. 4, 1922. W. B. Mal-
ing, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 17,361

In the Matter of WONG DOT (OT), #20284/11-9
ex SS. "China," June 12, 1921, Merchant's
Son, on Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable, United States District Judge,
Now Presiding in the United States District
Court, in and for the Northern District of
California, First Division.

It is respectfully shown by the petition of Wong
Toy Tiew that Wong Dot (Ot), hereafter in
this petition referred to as the "detained," is un-
lawfully imprisoned, detained, confined and re-
strained of his liberty by Edward White, Commis-
sioner of Immigration for the port of San Fran-
cisco, at the Immigration Station at Angel Island,
county of Marin, State and Northern District of

*Page-number appearing at foot of page of original certified Transcript
of Record.

California, Southern Division thereof; that the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6, 1882, July 5, 1884, November 3, 1893, and April 29, 1902, as amended and reenacted by Section 5 of the Deficiency Act of April 7, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner, intends to deport the said detained away from and out of the United States to the [2] Republic of China.

That the said Commissioner claims that the said detained arrived at the port of San Francisco on or about the 12th day of June, 1921, on the SS. "China," and thereupon made application to enter the United States as the son of a lawfully domiciled merchant, and that the application of the said detained to enter the United States as the minor son of a lawfully domiciled merchant was denied by the said Commissioner of Immigration, and that an appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration to the Secretary of the Department of Labor, and that the said Secretary thereafter dismissed the said appeal; that it is claimed by the said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair

hearing; that the action of the said Commissioner and the said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner, on his information and belief, alleges that the hearing and proceedings had herein, and the action of the said Commissioner, and the action of the said secretary was and is in excess of the authority committed to them by the said rules and regulations and by said statutes, and that the denial of the application of said detained to enter the United States as the son of a lawfully domiciled merchant was and is an abuse of the authority committed to them by the said statutes in each of the following particulars hereinafter set forth;

Your petitioner alleges upon his information and belief that the evidence presented before the immigration authorities upon the application of the said detained to enter the United States, which [3] said evidence is now hereby referred to with the same force and effect as if set forth in full herein, was of such a conclusive kind and character establishing the fact that the father of the detained was a lawfully domiciled merchant and that the said detained was his lawful minor son, and which said evidence was of such legal weight and sufficiency that it was an abuse of discretion on the part of the said Commissioner and the said secretary to

deny the said detained the right to admission into the United States and instead thereof to refuse to be guided by said evidence, and the said adverse action of the said Commissioner and the said secretary was, your petitioner alleges upon his information and belief, arrived at and was done in denying the said detained the fair hearing and consideration of his case to which he was entitled. Said action was done in excess of the discretion committed to the said secretary and to the said Commissioner of Immigration. And your petitioner further alleges upon his information and belief, that the said action of the said secretary and the said Commissioner was influenced against the said detained and against his witnesses solely because of their being of the Chinese race.

That your petitioner has not in his possession any part or parts of the said proceedings had before the said Commissioner and the said Secretary of Labor for the reason that your petitioner has just received telegraphic advice of the dismissal of the said appeal, and the copy of the said records, formerly in the possession of the attorney for the said detained, is now in the mails *en route* from Washington, D. C., to San Francisco; and it is for said reason impossible for your petitioner to annex hereto any part or parts of said immigration records; but your petitioner alleges his willingness to incorporate, and have considered as part and parcel [4] of his petition, the said immigration record when the same shall have been received from the Secretary of Labor at Washington, and shall

have it presented to this Court at the hearing to be had thereon.

That it is the intention of the said Commissioner to deport the said detained away from and out of the United States by the SS. "Nanking," sailing from the port of San Francisco on the 22d day of October, 1921, at 1 o'clock P. M., and unless this Court intervenes to prevent said deportation, the said detained will be deprived of residence within the United States.

That the said detained is in detention as afore-said, and for said reason is unable to verify this petition upon his own behalf, and for said reason this petition is verified by your petitioner, but for and as the act of the said detained.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner commanding and directing him to hold the body of the said detained within the jurisdiction of this Court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into, to the end that the said detained may be restored to his liberty and go hence without day.

Dated San Francisco, Cal., October 21st, 1921.

JOSEPH P. FALLON,
Attorney for Petitioner. [5]

State of California,
City and County of San Francisco,—ss.

Wong Toy Tiew, being duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that he has heard read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Chinese Characters.)

Subscribed and sworn to before me this 21st day of October, 1921.

[Notarial Seal] WM. E. SCHORD,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 21, 1921. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [6]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,361.

In the Matter of WONG DOT (OT), #20284/11-9
ex SS. "China," June 12, 1921, Merchant's
Son, on Habeas Corpus.

Order to Show Cause.

Upon reading and filing the verified petition of

Wong Toy Tiew praying for the issuance of the writ of habeas corpus,—

IT IS HEREBY ORDERED that Edward White, as Commissioner of Immigration at the port of San Francisco, at Angel Island, be and appear before the above-entitled Court, Department Number One thereof, on Saturday, the 5th day of November, 1921, to show cause, if any he have, why a writ of habeas corpus should not issue in this matter and the petition granted as prayed, and this at the hour of 10 o'clock of said day; and

IT IS FURTHER ORDERED that said Wong Dot (Ot) be not removed from the jurisdiction of this Court until the further order of this Court; and

IT IS FURTHER ORDERED that a copy of this order be served upon said Edward White or such other person having the said Wong Dot (Ot) in custody as an officer of said Edward White.

Dated: October 21, 1921.

M. T. DOOLING,
United States District Court Judge.

[Endorsed]: Filed Oct. 21, 1921. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [7]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,361.

In the Matter of WONG DOT (OT) on Habeas
Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Comes now the respondent, Edward White, Commissioner of Immigration, at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Assistant U. S. Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Nov. 26, 1921. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [8]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 26th day of November, in the year of our Lord, one thousand nine hundred and twenty-one. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 17,361.

In the Matter of WONG DOT (OT), on Habeas Corpus.

**Minutes of Court November 26, 1921—Hearing on
Order to Show Cause.**

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. J. P. Fallon, Esq., was present as attorney for petitioner and detained. P. A. Robbins, Esq., was present as attorney for and on behalf of respondent, and filed demurrer to petition, and all parties consenting thereto, it is ordered that the Immigration Records be filed as Respondent's Exhibits "A" to "F," inclusive, and that the same be considered as part of original petition. After argument by the respective attorneys, the Court ordered said matter submitted on records herein. [9]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,361.

In the Matter of WONG DOT (OT), on Habeas Corpus.

**(Opinion and Order Sustaining Demurrer to
Petition.)**

JOSEPH P. FALLON, Esq., Attorney for Petitioner.

JOHN T. WILLIAMS, Esq., United States Attorney, and BEN. F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

**ON DEMURRER TO PETITION FOR WRIT OF
HABEAS CORPUS.**

While it is quite possible that if the testimony in this record were presented to the Court in the first instance a different conclusion would have been reached from that of the Immigration Department, yet as the hearing was not unfair, and they found the facts against the applicant, the Court cannot interfere.

The demurrer must therefore be sustained and the petition denied.

December 8th, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 8, 1921. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [10]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,361.

In the Matter of WONG DOT (OT), on Habeas Corpus.

Notice of Appeal.

To the Clerk of said Court, and to the Honorable FRANK M. SILVA, United States Attorney in and for the Southern Division of the United States District Court, for the Northern District of California, First Division.

You, and each of you, will please take notice that Wong Toy Tiew, the petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered herein December 8, 1921, denying the petition for a writ of habeas corpus filed herein.

JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Dec. 10, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,361.

In the Matter of WONG DOT (OT), on Habeas Corpus.

Petition for Appeal.

Comes now Wong Toy Tiew, the petitioner in the above-entitled matter, and respectfully shows:

That on the 8th day of December, 1921, a judgment and order was made by the above-entitled Court, and entered herein denying a writ of habeas corpus in the above-entitled matter and dismissing the petition of said petitioner for a writ of habeas corpus in which said judgment and order certain errors were committed to the prejudice of the above-named Wong Dot (Ot), which more fully appear by his assignment of errors filed herewith.

WHEREFORE, your petitioner prays that an appeal may be allowed to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that the clerk of the above-entitled court be directed to make and prepare a transcript of all the papers, proceedings and record of the above-entitled matter and to transmit the same to the United States Circuit Court of Appeals, for the Ninth Circuit, within the time allowed by law, and for an order that the ex-

ecution of the warrant of deportation of said Wong Dot (Ot) be stayed pending this appeal.

JOSEPH P. FALLON,
Attorney for Petitioner. [12]

[Endorsed]: Filed Dec. 10, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[13]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 17,361.

In the Matter of WONG DOT (OT), on Habeas
Corpus.

Assignment of Errors.

Now comes the petitioner, Wong Toy Tiew, through his attorney, Joseph P. Fallon, Esq., and sets forth the errors he claims the above-entitled Court committed in denying his petition for a writ of habeas corpus as follows:

I.

That said Court erred in not granting said petition for a writ of habeas corpus.

II.

That said Court erred in denying said petition for a writ of habeas corpus.

III.

That said Court erred in holding that the petition did not show or tend to show that said Wong Dot

(Ot) did not obtain or was accorded a full and fair hearing or any legal hearing by said immigration officers or by said Secretary of Labor.

IV.

That the Court erred in not holding that the evidence submitted upon the application of the said detained to enter the United States was of such a conclusive kind and character and was of such legal weight and sufficiency that it was an abuse of discretion on the part of said immigration officials not to be guided thereby.

JOSEPH P. FALLON,

Attorney for Petitioner. [14]

[Endorsed]: Filed Dec. 10, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,361.

In the Matter of WONG DOT (OT), on Habeas Corpus.

Order Allowing Appeal.

It appearing to the above-entitled Court that Wong Toy Tiew, the petitioner herein, has this day filed and presented to the above Court his petition praying for an order of this Court allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and order

of this Court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor;

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and

IT IS HEREBY FURTHER ORDERED that the clerk of the above-entitled court make and prepare a transcript of all the papers, proceedings and record in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law; and

IT IS FURTHER ORDERED that the execution of the warrant of deportation of said Wong Dot (Ot) be and the same is hereby stayed pending this appeal and that the said Wong Dot (Ot) be not removed from the jurisdiction of this Court pending this appeal.

Dated: December 10th, 1921.

M. T. DOOLING,
United States District Judge. [16]

[Endorsed]: Filed Dec. 10, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [17]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 17,361.

In the Matter of WONG DOT (OT), on Habeas
Corpus.

**Stipulation and Order Respecting Withdrawal of
Immigration Record.**

It is hereby stipulated and agreed by and between the attorney for the petitioner and appellant herein and the attorney for the respondent and appellee herein, that the original immigration record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, there to be considered as a part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record, and so certified to by the clerk of the court.

Dated: San Francisco, California, December
—, 1921.

JOHN T. WILLIAMS,

Attorney for Respondent and Appellee.

JOSEPH P. FALLON,

Attorney for Petitioner and Appellant. [18]

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to may be withdrawn from the office of the clerk of this court and filed in the office of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by this Court.

Dated: San Francisco, California, January 28th, 1921.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jan. 28, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [19]

(Citation on Appeal—Copy.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, and JOHN T. WILLIAMS, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Wong Dot is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the

Northern District of California, this 28th day of January, A. D. 1922.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jan. 28, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [20]

**Certificate of Clerk U. S. District Court to
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 20 pages, numbered from 1 to 20, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of Wong Dot (Ot), on habeas corpus, No. 17,361, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Six Dollars and Ninety-five Cents (\$6.95), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal (page 22) issued herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 23d day of February, A. D. 1922.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk.

[21]

Citation on Appeal (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, and JOHN T. WILLIAMS, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Wong Dot is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the

Northern District of California, this 28th day of January, A. D. 1922.

M. T. DOOLING,
United States District Judge.

[22]

[Endorsed]: No. 17,361. United States District Court for the Northern District of California, Southern Division. Wong Dot, Appellant, vs. Edward White, Appellee. Citation on Appeal. Filed Jan. 28, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 3837. United States Circuit Court of Appeals for the Ninth Circuit. Wong Dot, Appellant, vs. Edward White, as Commissioner of Immigration, Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed February 23, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

10

United States

Circuit Court of Appeals

For the Ninth Circuit.

SHELL COMPANY OF CALIFORNIA, a Corporation,

Appellant,

vs.

PACIFIC STEAMSHIP COMPANY, a Corporation
of Portland, Maine, Claimant and Owner of the
Steamship "ADMIRAL GOODRICH," Her
Tackle, Apparel and Furniture,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

FILED
MAR 23 1922
F. D. MONGKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

SHELL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

PACIFIC STEAMSHIP COMPANY, a Corporation
of Portland, Maine, Claimant and Owner of the
Steamship "ADMIRAL GOODRICH," Her
Tackle, Apparel and Furniture,
Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

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Names and Addresses of Counsel.

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W. C. MORROW, Esq., Proctor for Appellee,
1226 Rust Building, Tacoma, Washington.

W. A. JOHNSON, Esq., Proctor for Appellee,
L. C. Smith Building, Seattle, Washington.

[1*]

In the District Court of the United States in and
for the Western District of Washington,
Northern Division.

No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

*Page number appearing at foot of page of original certified Apostles
on Appeal.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion of Portland, Maine,

Claimant.

Statement.

Time and commencement of suit — September 2,
1920.

NAMES OF PARTIES TO SUIT.

Shell Company of California, a corporation, libel-
lant and appellant.

Pacific Steamship Company, a corporation of Port-
land, Maine, claimant and appellee.

DATES WHEN PLEADINGS WERE FILED.

Libel, September 2, 1920,

Exceptions to libel, September 23, 1920,

Decision sustaining exceptions to libel, November
12, 1920,

Amended libel, January 20, 1921,

Exceptions to amended libel, February 1, 1921.

Decision denying exceptions, February 25, 1921,

Answer to amended libel, March 14, 1921.

Reply to answer, March 18, 1921. [2]

PROCEEDINGS UNDER PROCESS.

The vessel was not arrested on monition or at-
tachment. The Pacific Steamship Company, the
owner of the vessel filed a general bond in this
court on March 27, 1917, with the National Surety

Company as surety, in the sum of \$25,000.00, conditioned to answer the decree of the Court in all or any cases which should thereafter be brought in this court against said vessel "Admiral Goodrich" and certain other vessels therein named, as provided in Admiralty Rule No. 32 of this court.

On September 2, 1920, as provided by Admiralty Rule No. 33 of this court, the Clerk issued a notice of the commencement of this suit, to the Pacific Steamship Company and the National Surety Company, the principal and surety in said bond, giving the names of all libellants and the names and addresses of their proctors and the amount sued for, which notice was served by the U. S. Marshal upon said Pacific Steamship Company and said National Surety Company and his return of same made on said notice.

TRIAL.

On January 13, 1922, this cause was tried before Hon. Jeremiah Neterer, District Judge.

REFERENCE TO COMMISSIONER.

No question was referred to a Commissioner or Commissioners.

DECREE.

Final decree, finding for claimant, entered and filed, January 30, 1922.

NOTICE OF APPEAL.

Notice of appeal filed February 1, 1922. [3]

In the District Court of the United States in and
for the Western District of Washington,
Northern Division.

No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH" Her Tackle,
Apparel and Furniture,

Respondent.

Libel.

To the Honorable JEREMIAH NETERER, Judge
of the Above Court:

COMES NOW the Shell Company of California,
and brings its libel against the steamship "Admiral
Goodrich," now lying within the district aforesaid,
her tackle, apparel and furniture, in a cause of con-
tract civil and maritime and alleges as follows, to
wit:

I.

That at all the times herein mentioned, the Shell
Company of California was and is a corporation
organized and existing under and by virtue of the
laws of the State of California, and authorized to
and doing business within the State of Washington,
and having paid its license fees for the current
year.

II.

That at all the times herein mentioned, the steamship "Admiral Goodrich" was an American vessel and was owned by the Pacific Steamship Company, and that on the 23d day of July, 1919, the Pacific Steamship Company entered into a charter-party with the Gulf Mail Steamship Company for said vessel, a copy of which charter is hereto annexed, marked Exhibit "A," and made a part hereof. [4]

III.

That on the 14th of August, 1919, that while said vessel was lying in the port of San Francisco and being in need of fuel oil, at the request of the charterer of said vessel the above-named libelant delivered to said vessel fuel oil as follows:

388.19 Bbls. fuel oil	\$ 628.87
412.08 " " "	667.57
568.83 " " "	950.66
Barge Charge	20.00

Total	\$2267.10
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IV.

That no part of the amount due for said fuel oil, namely Two *Thousand Sixty-seven* and 10/100 (\$2267.10) Dollars, has been paid although demand has been made for said sum and such demand has been refused.

V.

That the said libelant did not know nor by the

exercise of reasonable diligence could it have been ascertained that the terms of the charter-party aforesaid provided for the payment of fuel oil by the above-named charterer.

VI.

That on or about the 1st of September, 1919, and while said fuel oil was on board of the said vessel, the said Pacific Steamship Company, the owner of said vessel, as provided by the terms of the charter, took possession of said vessel with said fuel oil on board and collected any and all sums of money due or owing on account of the then voyage of said vessel.

WHEREFORE the libelant prays that process in due form of law, according to the *court* of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said vessel, her tackle, apparel and furniture, and that all persons [5] having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the said amount due with costs, and interest from August 14, 1919, at the rate of 6 per cent per annum, and that said vessel may be condemned and sold to pay the same, and that the libelant may have such other and further relief as in law and justice he may be entitled to receive.

TUCKER & HYLAND,
Proctors for Libelant.

The United States of America,
Western District of Washington,—ss.

Don G. Fisher, being first duly sworn, on oath deposes and says: That he is the Northwestern manager of Shell Company of California; that he has read the foregoing action, knows the contents thereof and believes the same to be true.

DON G. FISHER.

Subscribed and sworn to before me this 1st day of September, 1920.

[Notary Seal] IVAN L. HYLAND.

Notary Public in and for the State of Washington,
Residing at Seattle. [6]

Exhibit "A."

CHARTER PARTY.

TIME CHARTER, GOVERNMENT FORM.

C. BEYFUSS CO.,
Ship & Freight Brokers,
San Francisco, Cal.

San Francisco, July 23, 1919.

IT IS THIS DAY MUTUALLY AGREED between PACIFIC STEAMSHIP COMPANY, agents for Owners of the Steamship or Vessel called the American steamship "ADMIRAL GOODRICH," of 1419 Tons Gross Register, and 836 Tons net Register, and a total deadweight capacity of about 2264 long tons including fuel tanks of about 3058 bbls. capacity, and reported to have a speed aver-

age 10 knots an hour on a consumption of about 100 bbls. of oil per 24 hours; deadweight cargo capacity about 1623 tons (2240 lbs.); cubic cargo capacity under deck about 1150 tons, and GULF MAIL STEAMSHIP COMPANY, charterers.

1. That the said owners agrees to let, and the said Charterers agree to hire the said Steam-Period ship for the term of three (3) calendar Months certain. The hire to commence from the day on which she is delivered or placed at the disposal of the Charterers at San Delivery Francisco in such dock or such safe Wharf or place (where she may always safely lie afloat) as Charterers may direct, she being then ready with clear holds, tight, staunch, strong, and every way fitted for the service (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage); Employ- to be employed in such lawful trades as ment Charterers or their Agents shall direct in Coastwise Trading of North and South America (Pacific Ocean) not north of Vancouver and not south of Peru, on the following conditions:

2. That the owners shall provide and pay for all Provisions, Wages, and Consular Fees Obliga- of the Captain, Officers, Engineers, Fire- tion men and crew; shall pay for the Insurance of the Vessel; also for all Deck, Galley and Engine Room store, including water for boilers, [7] bunker coal or fuel oil excepted, and main-

tain her in a thoroughly efficient state in Hull and Machinery for the service.

3. That the Charteres shall provide and pay for all Bunker Coals or Fuel Oil, Port, Light and Dock Charges, Pilotages, Agencies, Commissions, Labourage, Suez and other Canal Dues, when incurred, also all charges appertaining to the cargoes they may put on board.

4. That the Charterers shall accept and pay for all Coal or Oil in Ship's Bunkers upon commencement of hire; and the Owners shall on expiry of this Charter-Party, pay for all Coal or Oil then left in the Bunkers, at current market prices of the Port where the hire begins and ends.

5. That the Charteres shall pay for the use and hire of said Vessel at and after the rate of
Rate a lump sum of Twenty-one Thousand Five
of hire Hundred and Eight (\$21,508.00) Dollars
per calendar month, payments to be made
in Cash in advance monthly, commencing on the
day of delivery as aforesaid; hire to con-
Payment tinue from the time specified for termi-
nating the Charter until her redelivery
to Owners (unless lost) at San Francisco or Puget
Sound, Charterers' option and to be payable in
San Francisco.

5A. Charterers are to provide necessary dunnage and shifting boards, but Owners to allow them the use of the dunnage and shifting boards already aboard Steamer. Charterers to have the privi-

ledge of using shifting boards for dunnage, they making good for any damage thereto.

5B. Charterers agree to keep vessel free from liens and redeliver her free from liens.

6. Should the vessel be on a voyage occupying more time than herein stipulated, the rate Part of hire for such additional period to be of in the same proportion as above, and if re-month deliverd with Owner's consent before the expiration of the time stipulated, a corresponding rebate of hire to be allowed. [8]

7. In default of punctual and regular payment or payments as herein specified, the Owners shall have the faculty of withdrawing the vessel from the service of the Charterers, without prejudice to any claim they, the Owners, may otherwise have on the Charterers, in pursuance of this charter.

8. That the Cargo or Cargoes shall be laden and/or discharged in any dock, at any wharf or place that Charterers may direct where the vessel can always safely lie afloat.

9. That the whole reach, burthen of the ship (not being more than she can reasonable Cargo stow and carry), shall be at the Charterers space disposal, reserving only proper and sufficient space for Ship's Officers, Crew, Tackle, Apparel, Furniture, Provisions and Stores. Ballast Tanks to be at the disposal of Charterers for conveyance of fresh water. Charterers to have

the privilege of loading any usual deck cargo to be carried at Charterer's and/or Shippers' risk.

10. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with any cranes and/or winches the Steamer has, also with her crew and boats (and likewise work the condenser when required, and when in port to work from 8 A. M. to 5 P. M., or during such hours as Charterers or their Agents may require, Charterers paying usual overtime.

11. That the Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements; and Bills of Lading shall sign Bills of Lading as presented, and at any rate of freight the Charterers or their Agents may choose, without prejudice to this Charter-Party; and the Charterers hereby agree to indemnify the Owners from any consequences and liabilities that may arise from the Captain signing such Bills of Lading, or in his otherwise following the Charterer's instructions; the Stevedores shall be employed and paid by the [9] Charterers, but

12. Owners to provide all ropes, falls, blocks and slings necessary for handling ordinary cargoes up to three tons weight, also sufficient lanterns for night work. Should ship or cargo be damaged through insufficiency or inefficiency of the Steamer's tackle, the loss or damage so occasioned to be assured or paid for by Super-cargo

Owners. Charterers to supply mooring lines, if required, at South American Ports.

13. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain Captain, Officers, or Engineers, the and Owners shall, on receiving particulars Officers of the complaint, investigate the same, and if necessary, make a change in the appointments.

14. Vessel drydocked and painted March, 1919.

15. That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages, which are to be patent to Charterers or their Agents.

16. Average, if any, to be settled according to York-Antwerp Rules, 1890.

17. That in the event of the loss of time from deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing Loss the working of the vessel, for more than of twenty-four hours, the payment of the hire Time shall cease until she be again in an efficient state of resume her service at such place or position where the payment of hire ceased, and should the vessel in consequence of any of the matters aforesaid put into any port, other than that to place or position where the payment of hire ceased,

and should the Vessel in consequence of any of the matters aforesaid put into any port, other than that of which she is bound, the Port Charges, Pilotages, and other expenses at such port shall be borne by the Steamer's Owners [10] but should the vessel be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the Charterer's risk and expense.

18. That should the vessel be lost, damage to cargo or any damage to the steamer caused Loss by the cargo, the hire is to cease and determine on the day of her loss, and if missing from the date when last heard of, and any hire paid in advance and not earned shall be returned to Charterers.

19. The ship has liberty to call at any ports in any order, to sail with or without pilots, and to tow and assist in vessels in distress and to deviate for the purpose of saving life or property. Steamer not to tow except as per Clause 19.

20. The Act of God, perils of the sea, fire, bar-ratry of the Master and crew, enemies, Exceptions pirates and thieves, arrests and re-straints of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by negligence, default or error, in judgment of the Pilot, Master, Mariners, or other Servants of the Shipowners.

21. Ship not answerable for *loses* through ex-

plosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the Owners of the Ship, or any of them, or by the Ship's Husband or Manager.

22. That should any dispute arise between the Owners and Charterers as to the meaning and intention of this Charter-Party, or as to any act or thing to be done thereunder, the matter in dispute shall be referred to three Commercial persons in San Francisco, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final, and for the purpose of endorsing any award this agreement may be made a rule of Court. [11]

23. That the Owners shall have a lien upon all cargoes and sub-freights for arrears of hire, port charges, or any disbursements, fuel, etc., unpaid and Charterers to have a lien on the ship for all moneys paid in advance and not earned, after deducting Owners' and Charterer's expenses and Crews' proportion.

24. That all salvages and derelicts shall be for Owners' and Charterers' equal benefit.

25. In the event of war being declared during the currency of this Charter, by or against the nation to which the Steamer belongs Charterers to have option of cancelling this Charter, and also the option of cancelling if Steamer is not

delivered as above in seaworthy condition on or before August 18, 1919, but hire not to commence before the 7th of August, 1919, if required by Charterers.

27. Two and one-half per cent Commission commission is due on account of Hire under this Charter, and also upon the continuation or extension thereof, Vessel lost or not lost, and is payable by Owners of C. Beyfuss Co.

28. Charterers to have the liberty to sublet the Steamer upon written consent of Owners for all or any part of the time covered by this Charter, but Charterers remaining responsible for the fulfillment of this Charter-Party.

28-A. Time lost for any delay of quarantine for Charterers' account, except if caused by officers and/or crew, such loss of time to be for Owners' account.

If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness [12] of the ship, whether existing at the time of shipment or at beginning of the voyage, but not discoverable by due diligence, the consignee or owners of the cargo shall not be exempted from liability for contribution in General Average or for any special charges incurred, but with the

shipowners shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness.

28-B. No cargo to be loaded at a United States Pacific or British Columbia port for delivery at a United States Pacific or British Columbia port.

29. Penalty for non-performance of this Contract estimated amount of damages.

M. F. CROPLEY,

Witness to the signature of

PACIFIC STEAMSHIP CO.

F. M. BARRY,

O. C.,

Assistant General Manager.

R. G. SULLIVAN,

Witness to the signature of

GULF MAIL STEAMSHIP CO.

PAUL HARTMAN,

Pres.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sept. 2, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

In the District Court of the United States, in and for the Western District of Washington, Northern Division.

Bond to Marshal.

KNOW ALL MEN BY THESE PRESENTS: That we, Pacific Steamship Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Maine, as principal, and National Surety Company, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto John M. Boyle, Marshal of the United States for the Western District of Washington, and to whomsoever shall succeed him as Marshal of the United States for the said district, in the sum of twenty-five thousand (\$25,000) dollars, to be paid to said marshal, for the payment of which, well and truly to be made, we bind ourselves and our and each of our successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 22d day of March, 1917.

WHEREAS, the steamships "Admiral Wainwright," "Admiral Dewey," "Admiral Evans," "Admiral Watson," "Admiral Farragut," "Admiral Goodrich," "Admiral Schley," "Northland," "Aurelia," "City of Seattle," "Ravalli," "City of Topeka," "Curacao," "Governor," "Harvard," "Homer," "President," "Queen," "Senator," "Spo-

kane," "Umatilla," "Yale," and "Congress," and each and all of said vessels are now within or may hereafter come within or be found within the jurisdiction of the above-entitled court, and each of said vessels is time chartered to Pacific Steamship Company, as time-chartered owner thereof; and,

WHEREAS, the said vessels are, and each of them is, liable at any time to be libeled in the above-entitled court and arrested on process issued out of said court in the usual course of admiralty; [14] and,

WHEREAS, the said principal desired to avail itself of the provisions of Section 941 of the Revised Statutes of the United States as amended by the Act of March 3, 1899, and, in the manner therein provided, to stay the execution of all process against said vessels, and each of them, on account of any and all suits or proceedings in admiralty which may hereafter be brought in the above-entitled court against the above-named vessels, or any of them, and to prevent the vessels, or any of them, from being arrested on process issuing out of said Court.

NOW, THEREFORE, the conditions of this obligation are such that, if the said principal, Pacific Steamship Company, a corporation, shall satisfy the final decree of the above-entitled court, rendered and entered against it or against any or all of the above-named vessels in each and every proceeding that shall hereafter be commenced in said Court against any and all of the above-named

vessels, then this obligation shall be void; otherwise, to remain in full force and virtue.

IN WITNESS WHEREOF, the Pacific Steamship Company has caused its corporate name to be hereunto signed by its vice-president and its corporate seal to be hereunto affixed by its secretary, and the said National Surety Company has caused its corporate name to be signed hereto by its Resident vice-president and its corporate seal to be hereunto duly affixed by its resident assistant secretary, the day and year first above written.

PACIFIC STEAMSHIP COMPANY,

By E. C. WARD,

Its Vice-President.

[Corporate Seal] Attest: E. B. ROGERS,

Sec'y,

Its Secretary,

Principal.

NATIONAL SURETY COMPANY,

By L. H. WOOLFOLK,

Resident Vice-President,

[Corporate Seal] Attest: E. P. WELCH,

Resident Assistant Secretary. [15]

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. March 27, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [16]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

Claim by Owner.

And now before the Honorable Court comes Pacific Steamship Company, a corporation of Portland, Maine, owner of the steamship "Admiral Goodrich," her engines, tackle, apparel and furniture, and claims the above-named ship "Admiral Goodrich," her engines, tackle, apparel and furniture, and appears to defend this suit accordingly.

GROSSCUP & MORROW,

Proctors for Claimant.

Office and Postoffice Address: 3201-3 L. C. Smith
Building, Seattle, King County, Wash. [17]

Western District of Washington,
State of Washington,
County of King,—ss.

A. F. Haines, being duly sworn, says: That he
is the vice-president of the Pacific Steamship Com-

pany, a corporation; that Pacific Steamship Company is the owner of the steamship "Admiral Goodrich," her engines, tackle, apparel and furniture, against which this suit has been commenced by Shell Company of California, a corporation, libelant; that he is duly authorized to make this verification for and in behalf of said Pacific Steamship Company; and deponent further says that at the time of the commencement of this suit said steamship "Admiral Goodrich," her engines, tackle, apparel, etc., was in possession of claimant, as owner.

A. F. HAINES.

Subscribed and sworn to before me this 8th day of September, 1920.

[Notary Seal]

W. A. JOHNSON,

Notary Public in and for the State of Washington,
Residing at Seattle.

Due service of the within and foregoing claim by owner by the receipt of a true copy thereof, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court this 8th day of Sept., 1920.

TUCKER & HYLAND,

Proctors for Libelant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sept. 8, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

In the District Court of the United States in and
for the Western District of Washington,
Northern Division.

No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

Amended Libel.

To the Honorable JEREMIAH NETERER, Judge
of the Above Court.

COMES NOW the Shell Company of California
and brings its amended libel against the steamship
"Admiral Goodrich," now lying within the dis-
trict aforesaid, her tackle, apparel and furniture,
in a cause of contract civil and maritime and alleges
as follows, to wit:

I.

That at all the time herein mentioned, the Shell
Company of California was and is a corporation
organized and existing under and by virtue of the
laws of the State of California, and authorized to
and doing business within the State of Washington,
and having paid its license fee for the current year.

II.

That at all the times herein mentioned, the steamship "Admiral Goodrich" was an American vessel and was owned by the Pacific Steamship Company, and that on the 23d day of July, 1919, the Pacific Steamship Company entered into a charter party with the Gulf Mail Steamship Company for said vessel, a copy of which charter is annexed to the original libel, and that on the 14th [19] day of August, 1919, the above-named libelant did not know who the owner of the said vessel was, and did not know of the said charter nor of what was contained therein.

III.

That on the 14th day of August, 1919, while said vessel was lying in the port of San Francisco and being in need of fuel oil at the request of the charterer of said vessel the above-named libelant delivered to said vessel fuel oil as follows:

388.19	Bbls. fuel oil	.....	\$ 628.87
412.08	" " "	.....	667.57
586.83	" " "	.....	950.66
	Barge charge	.....	20.00
			<hr/>
			\$2267.10

IV.

That no part of the amount due for said fuel oil, namely, Two Thousand Sixty-seven and no/100 (\$2267.10) Dollars, has been paid, although demand

had been made for said sum and such demand has been refused.

V.

That on or about the first of September, 1919, and while said fuel oil was on board of said vessel, the said Pacific Steamship Company, the owner of said vessel, as provided by the terms of the charter, took possession of said vessel with said fuel oil on board and collected any and all sums of money due or owing on account of the then voyage of said vessel.

WHEREFORE, the libelant prays that process in due form of law, according to the rules of this Honorable Court in case of admiralty and maritime jurisdiction, may issue against the said vessel, her tackle apparel and furniture, and that all persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matter aforesaid and that this Honorable Court would be pleased to decree the payment of the said amount due with costs and [20] interest from August 14, 1919, at the rate of 6 per cent per annum, and that said vessel may be condemned and sold to pay the same, and that the libelant may have such other and further relief as in law and justice it may be entitled to receive.

TUCKER & HYLAND,

Proctors for Libelant.

The United States of America,
Western District of Washington,—ss.

Donnell G. Fisher, being first duly sworn, on oath

deposes and says: That he is the division manager of the Shell Company of California; that he has read the foregoing libel, knows the contents thereof and believes the same to be true.

DONNELL G. FISHER,

Subscribed and sworn to before me this 17th day of January, 1921.

[Notary Seal]

IVAN L. HYLAND,

Notary Public in and for the State of Washington,
Residing at Seattle.

Service of within amended libel this 19th day of Jan., 1921, and receipt of copy thereof, admitted.

GROSSCUP & MORROW,

Attorneys for Respondent.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 20, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Answer to Amended Libel.

To the Honorable JEREMIAH NETERER, Judge
of the District Court of the United States for
the Western District of Washington, Northern
Division:

The answer of Pacific Steamship Company,
claimant, to the amended libel of Shell Company of
California, a corporation, against the steamship
"Admiral Goodrich," her engines, tackle, apparel,
etc., alleges as follows:

I.

Claimant admits Article I of said amended libel.

II.

Claimant admits Article II of said amended libel.

except it denies that libelant did not know who the owner of said vessel was, and denies libelant did not know about the said charter or what was contained therein. [22]

III.

Answering Article III claimant avers it has no knowledge or information sufficient to form a belief as to the allegations therein contained, and, therefore, neither admits nor denies, but leaves the same to be proven by the libelant as it may be able so to do.

IV.

Answering Article IV of said amended libel claimant denies that the sum of \$2267.10, or any other sum whatsoever, is due to libelant.

V.

Answering Article V of said amended libel claimant denies each and every item, allegation and particular therein contained, except claimant admits it took possession of said vessel on or about September 1st, 1919.

FURTHER ANSWERING SAID AMENDED LIBEL AND BY WAY OF AFFIRMATIVE DEFENSE THERETO, claimant alleges as follows:

I.

That the libelant, the claimant, and the Gulf Mail Steamship Company, charterer of the steamship "Admiral Goodrich," were all residents of the State of California, having principal offices for the transportation of business at San Francisco, in

said state; that San Francisco was the port of supply of said steamship; that the name of the vessel, her home port and the house flag of claimant were plainly marked upon said steamship; that by reason of numerous previous recent dealings in connection with supplying the same vessel, the libelant knew that the claimant, and not the Gulf Mail Steamship Company, was the owner of [23] said steamship; that any inquiry, however slight, would have disclosed to libelant the terms of said charter-party, by reason of which the Gulf Mail Steamship Company was required to provide and pay for all fuel oil, and was required to keep said vessel free from liens and redeliver her free from liens, and that, therefore, the said Gulf Mail Steamship Company in ordering said fuel oil was without authority to bind the vessel therefor; that the libelant failed to exercise the diligence required of it by law in not ascertaining that, because of the terms of said charter-party, the Gulf Mail Steamship Company was without authority to bind the vessel for said fuel oil.

WHEREFORE, having fully answered said amended libel, claimant prays that same may be dismissed, with its costs herein to be taxed against the libelant, and for such other and further relief as to the Court may seem just.

GROSSCUP & MORROW,
Proctors for Respondent and Claimant. [24]

Western District of Washington,
State of Washington,
County of King,—ss.

H. C. Cantelow, first being duly sworn, on oath deposes and says: That he is the assistant general manager of Pacific Steamship Company, a corporation, claimant; that he makes this verification for and in behalf of said Pacific Steamship Company, being duly authorized so to do; that he has read the within and foregoing answer, knows the contents thereof, and the facts therein stated are true as he verily believes.

H. C. CANTELOW.

Subscribed and sworn to before me this 12th day of March, 1921.

[Notorial Seal]

W. A. JOHNSON,

Notary Public in and for the State of Washington,
Residing at Seattle.

Due service of the within and foregoing answer to amended libel by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 14th day of March, 1921.

TUCKER & HYLAND.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division, Mar. 14, 1921. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy. [25]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Reply.

The Shell Company of California for reply to the
Answer of the respondent herein states:

I.

That as touching the allegations contained in
paragraph I of the Affirmative Defense thereto,
denies the same and each and every part thereof.

WHEREFORE the libelant demands judgment

as heretofore demanded in the amended libel on file herein.

TUCKER & HYLAND,
Proctors for Libelant. [26]

Western District of Washington,
State of Washington,
County of King,—ss.

Don G. Fisher, being first duly sworn, on oath deposes and says: That he is the division manager of the Shell Company of California, a corporation, libelant; that he makes this verification for and on behalf of said Shell Company of California, being duly authorized so to do; that he has read the within and foregoing reply, knows the contents thereof and believes the same to be true.

DON G. FISHER.

Subscribed and sworn to before me this 16th day of March, 1921.

IVAN L. HYLAND,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of within reply this 18th day of March, 1921, and receipt of a copy thereof, admitted.

GROSSCUP & MORROW,
Attorneys for Respondent.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 19, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [27]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Stipulation for Taking Depositions.

IT IS HEREBY STIPULATED by and between
the proctors for the respective parties hereto that
the depositions of any witness or witnesses pro-
duced by either party hereto, may be taken upon
oral interrogatories, in accordance with Sec. 866 of
the Revised Statutes of the United States, before
Frank L. Owen, 502 California Street, San Fran-
cisco, California, a notary public for the State of
California, who is not of counsel for either party
hereto, nor interested in the event hereof, on the
12th day of May, 1921, at the hour of 2:00 o'clock
P. M. on that day, and that the hearing hereunder

may be adjourned from day to day thereafter until completed, and an order may be entered by either party hereto to that effect without notice.

Dated at Seattle, Washington, this 3d day of May, 1921.

TUCKER & HYLAND,

Proctors for Libelant.

GROSSCUP & MORROW,

Proctors for Respondent and Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 13, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [28]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corporation,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle, Apparel and Furniture,

Respondent.

Testimony.

BE IT REMEMBERED, that this cause came on regularly for trial on this, the 13th day of January, 1922, before the Hon. Jeremiah Neterer, Judge of the above-entitled court; the libelant appearing by Messrs. Tucker & Hyland, its proctors; and the respondent by Messrs. Grosscup & Morrow and — Johnson, Esq., its proctors; whereupon the following testimony was offered and proceedings had, to wit: [29]

Mr. HYLAND.—I desire, at this time, if your Honor please, to read in evidence the deposition of Cornelius F. Buckley, taken on behalf of the libelant.

The COURT.—Proceed.

(Deposition of Cornelius F. Buckley read.)

Mr. HYLAND.—That is our case, of your Honor please.

RESPONDENT'S CASE.

Mr. JOHNSON.—There is one deposition that was taken in San Francisco on behalf of the respondent, of Lawrence O'Connell, which I desire to read in evidence.

(Deposition of Lawrence O'Connell, read.)

Testimony of Frank Woolsey, for Respondent.

FRANK WOOLSEY, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. JOHNSON.)

Q. State your name, please.

A. Frank Woolsey.

Q. Mr. Woolsey, will you please state to the Court what your occupation is?

A. I am secretary of the Pacific Steamship Company.

Q. And as such secretary is it your duty to have charge of the official records of that company?

A. It is.

Q. Now, I will show you this document here, which we will—

A. That is the one I gave you this morning?
[30]

Q. Yes.

Mr. JOHNSON.—Before I go into this I will ask the Court, also Mr. Hyland, if there is any objection to our withdrawing these documents; they are originals?

Mr. HYLAND.—None at all.

Mr. JOHNSON.—We would like to put them in and substitute copies.

Mr. HYLAND.—Submit a copy now, if you want to.

(Testimony of Frank Woolsey.)

Mr. JOHNSON.—I haven't one with me.

Q. Showing you Respondent's Exhibit No. 17, will you please tell the Court what that is?

A. That is a copy of the bill of sale on the enrolled vessel.

Q. What vessel?

A. The "Admiral Goodrich."

Q. Running from whom to whom?

A. From the Arrow Line Steamship Company to the Pacific Alaska Navigation Company.

Q. What is the date of that?

A. The date is the 28th of February, 1916.

Q. February 28, 1916. This is the original bill filed in the Custom-house? A. Yes.

Q. Showing you Respondent's Exhibit No. 18, will you please tell the Court what that is?

A. That is a copy of a bill from the Pacific Alaska Navigation Company to the Pacific Steamship Company, a corporation, dated the 24th of October, 1918.

Q. 24th of October 1918. That also was the original that was filed in the Custom-house?

A. Yes, sir.

Q. I will show you Respondent's Exhibit No. 19.
[31]

A. That is a copy of the temporary register—temporary register No. 66.

Q. What vessel does that register cover?

A. The register of what was formerly the steam-

(Testimony of Frank Woolsey.)

ship "Arrow Line," now the "Admiral Goodrich," dated September 2, 1916.

Q. Now, Mr. Woolsey, what is the connection between the Pacific Alaska Navigation Company and the Pacific Steamship Company?

A. Well, the Pacific Alaska Navigation Company was the holding company of the steamship company—of the operating company.

Q. In what respect is it the holding company with regard to the stock?

A. Well, it is—I don't understand your question.

Q. Does it own the stock of the company, or is it the stock of the Pacific Steamship Company that—

A. No, it owns the stock of the company.

Q. Now, Mr. Woolsey, you have been in the shipping business on this coast for how long?

A. I started in San Francisco in 1875 or '76.

Q. Do you know about when the Pacific Alaska Navigation Company adopted the trade name of Admiral Line?

A. I could not say exactly, it must be ten or twelve years ago.

Q. Some considerable length of time, is it not?

A. Yes, sir.

Q. And I think you testified the Pacific Steamship Company is a subsidiary of the Pacific Alaska Navigation Company? A. Yes.

Q. And does the subsidiary now use the trade name of the parent company? A. Yes.

(Testimony of Frank Woolsey.)

Q. Outside of the "Admiral Wainwright" which was temporarily [32] operated by the Dollar company under that name, do you know of any other vessels named the "Admiral so-and-so" which are owned by any other company than the Pacific Alaska Navigation Company, or the Pacific Steamship Company?

A. No, not on this coast; they are all part of the Admiral Line through the Pacific Steamship Company's holdings; have been about thirteen of them altogether—twelve or thirteen.

Q. Twelve or thirteen Admirals. When you say "not on this coast" I presume you refer to the old United Fruit Company's steamers?

A. Yes, sir, old United Fruit Company's steamers.

Q. Where did those ships go to—what became of them?

A. They were sold to the Pacific Alaska Navigation Company.

Q. Some ten or twelve years ago? A. Yes.

Q. There are no vessels now, or have not been for a number of years that have been run by any company under the name of "Admiral so-and-so"?

A. Not that I know of.

Cross-examination.

(By Mr. HYLAND.)

Q. The Pacific Steamship Company is it, or is it not, now the owner, according to this bill of sale—

(Testimony of Frank Woolsey.)

the Pacific Alaska Navigation Company is the owner of this vessel?

A. No, the Pacific Alaska Navigation Company deeded it to the Pacific Steamship Company.

Mr. JOHNSON.—There is one more question, if you will permit me.

A. (By Mr. JOHNSON.) Since the purchase of the "Admiral Goodrich" by the Pacific Alaska Navigation Company and the Pacific Steamship Company later, up to the present time who has [33] owned that ship?

A. The Pacific Steamship Company.

Q. (By Mr. HYLAND.) You say that they adopted the name about ten or twelve years ago?

A. As I remember it.

Q. Who first used it?

A. The Admiral Line was the name given—I don't know—it was called the Admiral line or the White Steamers; they had four "Admirals," which were purchased by this company.

Q. Were you with the company at that time?

A. Not at that time, no.

Q. How long have you been with the company?

A. Well, officially since about a year ago.

Q. With what company were you prior to that time?

A. Well, I was not with any steamship organization at all.

(Testimony of Frank Woolsey.)

Q. You were in the shipping business in San Francisco?

A. No, I had been in Portland; and I think I had been in Tacoma at different times in connection with Dodwell & Company.

Q. You were in their employ, or connected with them in some way?

A. With the steamship company?

Q. Yes?

A. No, not officially.

Q. Just as a matter of recollection, do you know how long they have used the "Admiral" name?

A. Well, I have been familiar with the name a good many years.

Q. But was it used prior to the formation of the Pacific Steamship Company?

A. How is that? [34]

Q. Who used the name of Admiral Line prior to the formation of the Pacific Steamship Company?

A. The Pacific Alaska Navigation Company, I suppose.

Q. The Pacific Alaska Navigation Company, you suppose? A. Yes, sir.

Q. What vessels did they operate under that name, do you know?

A. Well, they operated the entire fleet which had been in operation, and had been for a number of years; the name was used by all of the vessels in the organization.

Q. I don't want to be captious, or I do not wish

(Testimony of Frank Woolsey.)

to show too much of my ignorance about it, but who formed the original Pacific Alaska Navigation Company, was that Mr. Alexander?

A. His company, yes, sir.

Q. Formed for operation of vessels to Alaska, was it not?

A. Well, I suppose originally that was the—coastwise and Alaska.

Q. There was at that time the Pacific Coast Company operating San Francisco boats out of here?

A. I don't understand your question. The Pacific Coast Company you referred to—

Q. The Pacific Coast Company was operating boats out of here, and the Pacific Alaska Navigation Company bought the Pacific Coast Company's boats?

A. The Pacific Alaska Navigation Company.

Q. You can't say when Mr. Alexander did take over the Admiral Line?

A. I could not say without referring to the files.

Q. But, as I understand it, in 1916 the Pacific Steamship Company went into business?

A. That is right, I think. [35]

Q. Prior to that time they had been operating under the name of the Pacific Alaska Steamship Company?

A. Alaska Pacific, and Pacific Alaska Navigation Company.

Q. Pacific Alaska Navigation Company. That is all.

(Witness excused.)

Respondent rests.

Testimony closed.

(ARGUMENT.)

The COURT.—I will take the matter under advisement.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 2, 1922. F. M. Harshberger, Clerk, By S. E. Leitch, Deputy. [36]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corporation,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her
Tackle, Apparel and Furniture,
Respondent.

Decision.

Filed January 19, 1922.

TUCKER & HYLAND, Proctors for Libelant.

GROSSCUP & MORROW, Proctors for Claimant,
Pacific Steamship Company.

NETERER, District Judge.

The libelant seeks to recover compensation for feul oil furnished August 14, 1919, to the Gulf Mail Steamship Co., charterer of the steamship "Admiral Goodrich." The steamship "Admiral Goodrich" at the time being owned by the Pacific S. S. Co. The Gulf Mail S. S. Co., charterer, libelant, and claimant *all* at the time had principal offices at San Francisco. By the terms of the charter-party the charterer was required to keep the S. S. free from liens. The claimant denies liability and alleges that the libelant failed to exercise the required diligence, to ascertain the authority of the charterer to bind the steamship. Mr. Buckley, Assistant Manager of the Fuel Oil department of the libelant, testifies that Mr. Hartman, the president of the Charterer, by telephone called him up and

"told me they wanted oil for the 'Admiral Goodrich'; that they were in a hurry for it."

He further stated:

"The Gulf Mail S. S. Co., was acting as manager of the steamer, and charged it to the steamer and owner. Q. What inquiry did you make as to ownership? A. I didn't make any.

Q. Why didn't you make any? A. I never had been able to find out who the owners of the steamer were, they changed around so much.

Q. What steamers do you mean? A. Well, take these steamers on the Admiral Line and Pacific S. S. Co., the Alaska S. S. Co., the Pacific-Alaska S. S. Co., they were shifting their ships around so you could not keep track of who the owners were; in fact, one time I remember a case where I tried to find out who the owners were, and they were 'huffy' about it, and thought I was trying to get hold of the controlling stock, so I gave it up as bad business; we never could get any business if we followed those tactics."

On cross-examination it was shown that [37] the Pacific S. S. Co. purchased fuel oil for the "Admiral Goodrich" nine times within ten months, the last purchase being June 20, 1919; the dates of purchase being as follows: Oct. 28, Nov. 21, Dec. 6, 12, 20, 20, 27, 1918. Feb. 3, March 31, May 16, June 20, 1919. Letters of the libelant are presented with relation to each delivery and reference is made to *purchase of fuel oil for the "Admiral Goodrich."* In all these letters it is stated that advices had been given that the "Admiral Goodrich" would take delivery of oil, or that fuel oil had been delivered to "Admiral Goodrich." The Pacific Alaska S. S. Co., is a holding company for the Pacific S. S. Co., under date of October 24, 1918 the S. S. "Admiral Goodrich" was formally transferred to the claimant. Libelant relies on the South

Coast, 251 U. S. 519; *The Dumois*, 68 Fed. 926; *The St. John's*, 273 Fed. 1005; *The Angy B. Watson*, 274 Fed. 219.

The relation between libelant and claimant on furnishing oil to the "*Admiral Goodrich*" and its disclosed knowledge of the confusion of the steamers on the *Admiral* line to which the charterer was not a party or in any way identified, is conclusive that the libelant must be charged with such knowledge of ownership as required reasonable diligence to ascertain the terms of the charter-party; and such diligence would have disclosed that the terms of the charter-party prohibited the charterer from binding the vessel. Sec. 7785, C. S.; 36 Stat. 605. *The South Coast*, *supra*, is distinguished from the instant case, because in that case, the charter-party permitted a lien, whereas, in the instant case the charter-party prohibits a lien. *The Dumois*, *supra*, was decided May 1895, whereas, the act in issue was enacted June 23, 1910. *The St. John's*, *supra*, [38] is distinguished in that libelant knew nothing about the ship, except, that it was in possession of those who ordered the supplies, whereas, in the instant case, libelant knew there was "*confusion*," about the ownership of the "*Admiral*" steamers with companies other than the charterer, and had furnished fuel for the "*Admiral Goodrich*" to the claimant for eight months previous. *The Angy B. Watson*, *supra*, has no bearing on the facts here. Decree for claimant.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [39]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Cor-
poration,

Libelant,

vs.

Steamship “ADMIRAL GOODRICH,” Her
Tackle, Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Decree.

The above-entitled cause coming on regularly to be heard before the Honorable Jeremiah Net-
erer, Judge of the above-entitled Court, on January
13, 1922, the libelants being represented by Messrs.
Tucker & Hyland and the claimant by Messrs.
Grosseup & Morrow, and the Court having heard
and considered the evidence introduced in behalf
of the parties hereto and having heard the argu-
ment of counsel for both parties, and on January

19th having filed its decision, in writing, with directions that a decree be entered for the claimant,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the libelant take nothing by its libel; that claimant be dismissed and have judgment for its costs to be taxed against the libelant by the Clerk; that the surety on claimant's release of libel bond and the stipulator on claimant's stipulation for costs be, and they are each hereby relieved from further liability thereunder.

Done in open court this 30th day of January, 1922.

JEREMIAH NETERER,

District Judge. [40]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan 30, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [41]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Cor-
poration,

Libelant,

vs.

Steamship “ADMIRAL GOODRICH,” Her
Tackle, Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Exception to Decree Dismissing Libel.

Comes now the libelant and excepts to the de-
cree dismissing the libel herein on the ground
and for the reason that the same is not in accord-
ance with the facts, and that the decree is erroneous
and should have been for the libelant as prayed
for in the amended libel.

WILMON TUCKER,
IVAN L. HYLAND,
FORD Q. ELVIDGE,

Proctors for Libelant.

The foregoing exception is hereby allowed.

Done in open court this 1st day of February,
1922.

JEREMIAH NETERER,
Judge.

Service of within exceptions this 1st day of Feb., 1922, and receipt of copy thereof, admitted.

GROSSCUP & MORROW,

Proctors for Claimant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [42]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corporation,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle, Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corporation,

Claimant.

Notice of Appeal.

Now comes the said libelant, Shell Company of California, and feeling aggrieved by the decree and opinion, to which it refers, which said decree was made on the 30th day of January, 1922, dismissing

the libel filed herein, do hereby appeal from said decree, with the object of securing a reversal of said decree and securing a decree for libelant's damages as claimed, to the Circuit Court of Appeals for the Ninth Circuit, and said libelant prays that its appeal may be allowed, and that the records of said cause may be duly transcribed and certified to said Circuit Court of Appeals, to be there heard upon the pleadings and proof as shown by said record, and that this Court will fix the penalty of the appeal bond to be given therein.

Dated at Seattle, Washington, this 1st day of February, 1922.

TUCKER & HYLAND,

Proctors for Libelant and Appellant. [43]

Service of within notice of appeal this 1st day of Feb., 1921, and receipt of copy thereof, admitted.

GROSSCUP & MORROW,

W. A. JOHNSON,

Proctors for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [44]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Petition for Appeal.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit.

Shell Company of California, the libelant and ap-
pellant herein, respectfully shows as follows:

I.

That on or about the 17th day of January, 1921,
the libelant filed a libel in the District Court of the
United States for the Western District of Washing-
ton, Northern Division, against the above-named
steamship "Admiral Goodrich," in a cause civil
and maritime to recover the sum of \$2267.10 for oil
furnished by the libelant from said steamship with

interest and costs, as by reference to the said amended libel will more fully appear.

II.

That on or about the 12th of March, 1921, the claimant duly appeared and filed its answer to said amended libel, praying that the libel be dismissed with costs, as by reference to said answer will more fully appear. [45]

III.

That in January, 1922, the said cause came on for hearing before the Honorable Jeremiah Neterer, Judge of the District Court, and such proceedings were had that on the 25th day of January, 1922, the said Judge filed his opinion in writing, and thereafter, and on the 30th day of January, 1922, a final decree was made and entered in said suit, where it was adjudged that the libel be dismissed and that the claimant recover the sum of \$95.81 costs.

IV.

The above-named libelant and appellant is advised and insists that said final decree is erroneous in that it does not decree payment of the libelant's claim with interests and costs.

V.

For these reasons and othe reasons the above-named libelant and appellant appeals from said final decree to the United States Circuit Court of Appeals for the Ninth Circuit, and said appellant intends to seek a new decision on the law and on

the facts upon the pleadings and proof in said District Court, and upon new pleadings and proof to be introduced in this court, and prays that the record and proceedings aforesaid may be returned to the United States Circuit Court of Appeals for the Ninth Circuit, and that said decree be reversed, and the libellant be decreed payment of its claim, with interest and costs in this court and in the United States District Court.

WILMON TUCKER,

IVAN L. HYLAND,

FORD Q. ELVIDGE,

Proctors for Libellant. [46]

Service of within petition this 1st day of Feb. 1922, and receipt of copy thereof, admitted.

GROSSCUP & MORROW,

W. A. JOHNSON,

Proctors for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch. Deputy. [47]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpora-
tion,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Assignments of Error on Appeal.

And now on this day came the said libelant by
Wilmon Tucker, Ivan L. Hyland and Ford Q. El-
vidge, its proctors, and says that the decree in said
cause is erroneous and against the just rights of
the said libelant for the following reasons:

I.

Because the above-named libelant under the
proof in the above-entitled cause has shown that it
had a right to a lien for the oil furnished under
the Act of Congress of May 23, 1910, which is now
incorporated in the Merchant Marine of 1920.

II.

Because the evidence shows that then the

employees or officers of the libelant had notice that there was a charter upon the steamship "Admiral Goodrich," nor did any of the officers of the libelant corporation have any notice or knowledge of any of the provisions of such charter.

III.

Because the oil was sold by the libelant to the "Admiral [48] Goodrich" as ordered by the manager of the steamer, and charged to the steamer and owners, and because the said steamship "Admiral Goodrich" was advertised as one of the Gulf Mail steamers in the "Guide."

IV.

Because according to the law the burden was upon the claimant to show that the libelant knew or had reasonable cause to believe that a charter existed, and the mere fact that in the year 1918 and 1919 because the libelant furnished oil to the Pacific Steamship Company for the "Admiral Goodrich" in the Orient is not sufficient notice of ownership or of the chartering said vessel to exempt the steamship "Admiral Goodrich" from a lien for the oil so furnished.

V.

Because the evidence shows that when the first oil was furnished to the "Admiral Goodrich" in the Orient it was prior to the time that the steamship "Admiral Goodrich" was owned by the Pacific Steamship Company.

VI.

Because the evidence shows that the bill of sale to the Pacific Steamship Company of the steamship "Admiral Goodrich" was never filed in the custom-house in San Francisco or in any other place than in the custom-house in Portland, Maine; nor was the charter ever filed for record in any public office whatsoever.

VII.

Because there is nothing shown in the letters and correspondence which has been entered in evidence in the above-entitled cause in any manner showing the ownership of the steamer "Admiral Goodrich."

VIII.

Because the evidence taken as a whole shows conclusively [49] that the libelant did not have any notice of the ownership of said vessel nor of the existence of any charter and delivered the oil in good faith for the use of said vessel, and which was used upon the said vessel.

IX.

Because the above-named claimant failed to sustain the burden of proof placed upon it by reason of the Act of Congress of May 23, 1910.

WHEREFORE, the said libelant prays that the said decree dismissing the amended libel be reversed, and that said Court may be directed to enter

a decree in accordance with the prayer of the amended libel.

WILMON TUCKER,
IVAN L. HYLAND,
FORD Q. ELVIDGE,

Proctors for Libellant.

Service of within assignments of error this 1st day of Feb. 1922, and receipt of copy thereof, admitted.

GROSSCUP & MORROW,
W. A. JOHNSON,

Proctors for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 1, 1922. F. M. Harshberger, Clerk. By S. E. Lietch, Deputy. [50]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corporation,

Libellant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

**Order Allowing Appeal and Fixing Amount of
Bond.**

The motion of Messrs. Wilmon Tucker, Ivan L. Hyland and Ford Q. Elvidge, proctors for the libelant and appellant herein,—

It is ORDERED, that an appeal to the United States Circuit Court of Appeals of the Ninth Circuit from the decree rendered and entered herein dismissing the amended libel of the said appellant, and awarding costs in favor of the claimant, be and the same is hereby allowed.

It is further ORDERED that the bond on appeal be and the same is hereby fixed at \$500.00, the same to be and act as a supersedeas bond, and also as a bond for costs on said appeal.

Done in open court this 1st day of February, 1922.

JEREMIAH NETERER,

Judge.

Service of within order this 1st day of Feb. 1922, and receipt of copy thereof, admitted.

GROSSCUP & MORROW,

W. A. JOHNSON,

Proctors for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [51]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY —No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpora-
tion,

Libellant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned, Shell Company of California,
as principal, and National Surety Company, as
surety, are held and firmly bound unto the Pacific
Steamship Company, the claimant, in the above-
entitled cause, in the full and true sum of five
hundred dollars (\$500.00), to be paid to it and its

successors and assigns, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators, assigns and successors in interest, jointly and severally, firmly by these presents.

Signed, sealed, executed and delivered this 1st day of February, 1922.

NOW, THEN, the condition of the above obligation is such that

WHEREAS, the above-named libelant, Shell Company of California, has caused an appeal to be taken to the said Circuit Court of Appeals of the Ninth Circuit from the final decree rendered and entered in favor of the above-named claimant on the 30th day of January, 1922, in the above-entitled cause, and in said appeal praying among other [52] things that the said decree may be reversed. If, then, the above-named appellant and libelant shall prosecute this appeal to effect and answer all damages and costs if they or either of them shall fail to make its appeal good, and shall pay and satisfy the decree and costs to be rendered, and abide by and satisfy any judgment, order or decree of the above-entitled court or of said United States Circuit Court of Appeals upon the determination of said appeal, and shall abide by and perform whatever decree may be rendered by said United States Circuit Court of Appeals in this cause or on the mandate of said court by the said District Court of the United States for the Western District of Wash-

ington, Northern Division, then this obligation to be void, otherwise to remain in full force and effect.

SHELL COMPANY OF CALIFORNIA,

By TUCKER & HYLAND,

Its Proctors.

NATIONAL SURETY COMPANY,

[Corporate Seal]

By ROBT. WHYTE,

Attorney-in-fact.

The above bond in all things approved this 1 day of February, 1922.

JEREMIAH NETERER,

Judge.

Due and timely service of a copy of this bond admitted this 1st day of February, 1922, and notice of filing of same admitted and all notice waived, and it is hereby agreed that the same may be by the above-entitled Court approved.

GROSSCUP & MORROW,

W. A. JOHNSON,

Proctors for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [53]

In the United States District Court for the Western
District of Washington, Northern Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Cor-
poration,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

**Order Directing Sending Up of Original Exhibits,
Depositions on File, and Copies Substituted
for Certain Original Exhibits.**

The libelant, Shell Company of California, having filed its appeal which has been allowed, and having filed its praecipe for a transcript, and the proctors for the claimant agreeing hereto; it is

ORDERED that the clerk of the above-entitled court shall send to the clerk of the Circuit Court of Appeals all original exhibits attached to the depositions and the depositions on file and also the copies of the exhibits which have been substituted for original exhibits.

It is further ORDERED that the Clerk of the Circuit Court of Appeals need print only that portion of the exhibit which is the "Guide" of San Francisco, setting forth the title of the said newspaper, the date thereof and where published, and that portion of said publication referring to the

advertisement of the Gulf Mail Steamship Company.

Done in open court this 1st day of February, 1922.

JEREMIAH NETERER.

Judge.

Approved.

GROSSCUP & MORROW,

W. A. JOHNSON,

Proctors for Claimant. [54]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 1. 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [55]

In the United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corporation,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle, Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corporation,

Claimant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a record on appeal in the above-entitled cause setting forth the following documents and pleadings, to wit:

The original and amended libel with the exhibits attached thereto. Answer to amended libel. Reply.

The testimony on the part of the claimant and any exhibits.

The depositions of Lawrence O'Connell and Cornelius F. Buckley and the claim of the owners for the "Admiral Goodrich" and the bond given by the Pacific Steamship Company to John M. Boyle March 27, 1917, the stipulation for the depositions on behalf of the claimant and respondent and the original exhibits.

The opinion of the Court on the merits.

The final decree and exception.

The petition for the appeal, together with the allowance thereof.

The notice of appeal.

Appeal bond.

Assignments of error.

Order directing the sending up of exhibits and depositions, etc. [56]

This praeceptum.

WILMON TUCKER,
IVAN L. HYLAND,
FORD Q. ELVIDGE,
Proctors for Libelant.

Copy received Feb. 1st, 1922.

GROSSCUP & MORROW,

W. A. JOHNSON,

Proctors for Claimant.

[Indorsed]: Filed in the United States District Court. Feb. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [57]

In the District Court of the United States in and for the Western District of Washington, Northern Division.

No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corporation,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle, Apparel and Furniture,

Respondent.

Certificate of Clerk U. S. District Court to Apostles on Appeal.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this transcript of record, consisting of pages numbered from 1 to 57, inclusive,

to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the proctor for libelants and appellants herein for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit [58] in the foregoing entitled causes, to wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate or return—130 fo.	
at 15¢	\$19.50
Certificate of Clerk to transcript of record—	
4 folios at 15¢ .....	.60
Seal to said certificate .....	.20
Certificate of Clerk to original exhibits—3	
folios at 15¢ .....	.45
Seal to said certificates .....	.20

I further certify that the above costs for prepar-

ing and certifying this record, amounting to \$20.95, has been paid to me by attorneys for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 23d day of February, A. D. 1922.

[Seal]

F. M. HARSHBERGER,
Clerk of the United States District Court, Western
District of Washington. [59]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

IN ADMIRALTY—No. —.

SHELL COMPANY OF CALIFORNIA, a Corporation,

Libelant and Appellant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

PACIFIC STEAMSHIP COMPANY, a Corporation,

Claimant and Appellee.

Citation.

To the Above-mentioned Pacific Steamship Company, Claimant and Appellee, and to the Steamship "Admiral Goodrich," the Respondent:

WHEREAS, the libelant, Shell Company of California, a corporation, has appealed to the United States Circuit Court of Appeals from the decree lately rendered by the United States District Court for the Western District of Washington, Northern Division, dismissing the amended libel of the libelant against the Steamship "Admiral Goodrich," her tackle, apparel and furniture, and on said appeal have filed security as required by law;

THEREFORE, you are hereby cited to *appeal* before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty days from the date hereof, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the City of Seattle, in the District above named, on the 2d day of February, 1922, and of the Independence of the United States the one hundred forty-seventh.

JEREMIAH NETERER,

Judge. [60]

Due service of the above citation is hereby admitted this 1st day of February, 1922.

GROSSCUP & MORROW,

W. A. JOHNSON,

Proctors for Appellee. [61]

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Shell Co. of Calif., Libellant and Appellant, vs. "Adm. Goodrich," Respondent, Pac. S. S. Co., Claimant Citation. Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 3838. United States Circuit Court of Appeals for the Ninth Circuit. Shell Company of California, a Corporation, Appellant, vs. Pacific Steamship Company, a Corporation of Portland, Maine, Claimant and Owner of the Steamship "Admiral Goodrich," Her Tackle, Apparel and Furniture, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 27, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

Libelant's Exhibit "A."

[Advertisement Appearing in "San Francisco Guide," July 26, 1919.]

GULF MAIL STEAMSHIP CO.

Mexico, Central and South America.

via Los Angeles and San Diego.

S. S. Alliance.....	Aug. 20
(A Steamer)	Sep. 15
S. S. Admiral Goodrich (2500 ton, steel)....	Oct. 1
S. S. J. B. Stetson.....	Oct. 15
M/s Oregon (3500 ton, twin screw).....	Nov.
S. S. Nehalem.....	Dec.

Ensenada, La Paz, Guaymas, Topolobampo,
Mazatlan.

S. S. Alliance.....	Aug. 20
---------------------	---------

Manzanillo, Salina Cruz, Guayaquil and Callao.

S. S. Admiral Goodrich.....	Aug. 10
-----------------------------	---------

Apia and Pago Pago.

Sc. Zampa	—
-----------------	---

General Offices, 1 Drumm St. Phone—Sutter 3086.

E. L. BERTAUD, Traffic Manager.

[Endorsed]: #5530. Libelant's Ex. "A." Adm.
1/13/22.

No. 3838. United States Circuit Court of Appeals for the Ninth Circuit. Filed Feb. 27, 1922.
F. D. Monckton, Clerk.

In the United States District Court for the Western
District of Washington, Northern Division.

No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle,
Apparel and Furniture,

Respondent.

**Certificate of Clerk U. S. District Court to Original
Exhibits.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the attached envelope contains all of the original exhibits introduced in evidence at the trial of the above-mentioned cause in said District Court, with the exception of Respondent's Exhibits 17, 18, and 19, for which original exhibits copies have been substituted, and directed by order of said district court to be forwarded to the Circuit Court of Appeals for the Ninth Circuit to be considered by it in the hearing of the appeal herein, to wit:

Libelant's Exhibits marked "A" and "B," and

Respondent's Exhibits 1 to 12, inclusive, attached to deposition of Cornelius F. Buckley, Jr.

Respondent's Exhibits 13 to 16, attached to deposition of Lawrence O'Connell, exhibits 17, 18 and 19, being copies substituted for the originals.

I further certify that the said envelope contains all of the depositions filed and read as evidence in the above-entitled cause, to wit, the deposition of Cornelius F. Buckley, Jr., taken on behalf of libelant, and the deposition of Lawrence O'Connell taken on behalf of respondent.

WITNESS my hand and the seal of said District Court, at Seattle, Washington, this 21st day of February, 1922.

[Seal]

F. M. HARSHBERGER,

Clerk of United States District Court, Western District of Washington.

[Endorsed]: No. 3838. United States Circuit Court of Appeals for the Ninth Circuit. Filed Feb. 27, 1922. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SHELL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

PACIFIC STEAMSHIP COMPANY, a Corporation of
Portland, Maine, Claimant and Owner of the Steam-
ship "ADMIRAL GOODRICH," Her Tackle, Ap-
parel and Furniture,

Appellee.

Supplemental Apostles on Appeal.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

FILED

APR 18 1922

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

SHELL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

PACIFIC STEAMSHIP COMPANY, a Corporation of
Portland, Maine, Claimant and Owner of the Steam-
ship "ADMIRAL GOODRICH," Her Tackle, Ap-
parel and Furniture,
Appellee.

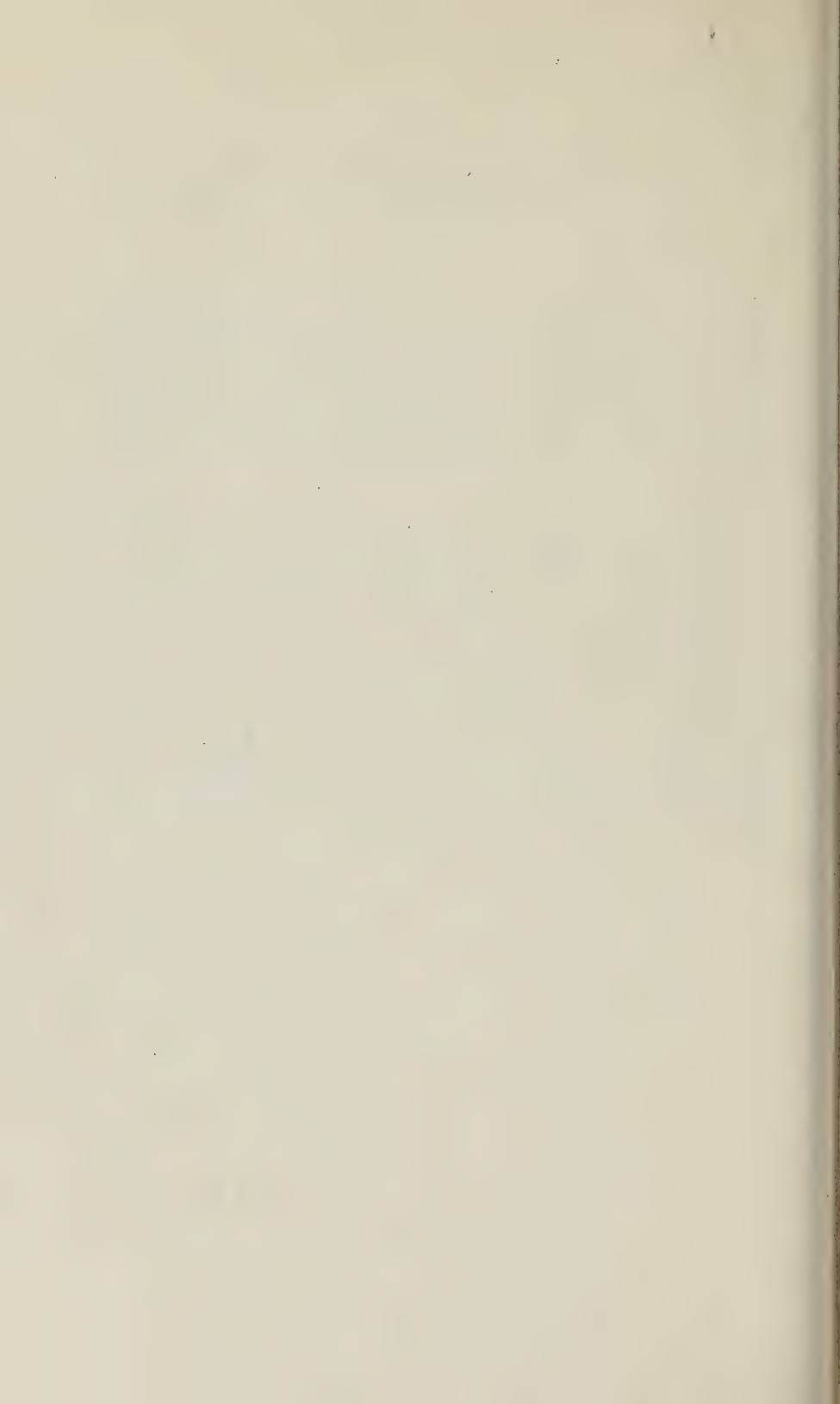
Supplemental Apostles on Appeal.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

WILMON TUCKER, Esq., Attorney for Appellants,

307 Lowman Building, Seattle, Washington.

IVAN L. HYLAND, Esq., Attorney for Appellants,

307 Lowman Building, Seattle, Washington.

FORD Q. ELVIDGE, Esq., Attorney for Appellants,

307 Lowman Building, Seattle, Washington.

B. S. GROSSCUP, Esq., Attorney for Appellee,

L. C. Smith Building, Seattle, Washington.

W. C. MORROW, Esq., Attorney for Appellee,

L. C. Smith Building, Seattle, Washington.

W. A. JOHNSON, Esq., Attorney for Appellee,

L. C. Smith Building, Seattle, Washington.

[1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Cor-
poration,

Libelant,

vs.

Steamship “ADMIRAL GOODRICH,” Her
Tackle, Apparel and Furniture,

Respondent;

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Memorandum of Authorities.

The Act of June 23, 1910, relating to liens on ves-
sels for repairs, supplies or other necessities.

36 Stat. 604—United States Compiled Stat-
utes, Sections 7783 to 7787.

The South Coast, 251 U. S. 519.

“How far may one furnishing services to a vessel,
without any actual knowledge of her ownership,
agents or charterings, and dealing with some per-
son other than the Master shut his eyes, avoid or
neglect all inquiry, and rest upon an authority to
contract, which is in essence nothing more than an
inference from an apparent act of authority?”

The Hatteras, 255 Fed. 518.

The Court further said that the tug owner made no [2] inquiry, literally knew nothing and sought to know nothing about the relationship of the hirer to the barges. That such circumstances amount to shutting ones eyes to keep out the light and successfully rebut any presumption of lien.

In the case of *Curacao Trading Company vs. Bjorge*, 263 Fed. 693, writ of certiorari denied, 253 U. S. 492, it was held that the lien statute does not create a presumption, that a charterer, unless he is also either the ship's husband, master or person to whom the management of the vessel at the port of supply is entrusted, has authority from the owner to procure repairs, supplies or other necessities for the vessel. That no lien on a vessel is given for supplies procured by one having no such relations to it, that under the terms of the statute he (the charterer) is presumed to have authority from the owner to procure supplies.

“Furthermore, circumstances either known to the appellant (furnisher) or which it easily could have ascertained, made it apparent that it was not to be expected that the owner, or the master for it, would be concerned about the vessel being supplied with the coal required to enable it to proceed on its voyage.”

In the case last cited it was decided that the *South Coast (supra)* was not authority for the proposition that a vessel may be subjected to a lien for the price or value of supplies furnished to a charterer who is without authority to bind the vessel or its owner thereof.

It must be clearly understood in the case at bar that the master had nothing to do with the ordering of these supplies. [3]

Assuming, but not admitting, that the charterer was one of the persons named in the statute as having presumptive authority from the owner to procure supplies, the charter-party in this case, which is a time charter and not a demise, by its terms prohibits the charterer from creating liens upon the vessel. (See Clause 5 of charter-party, Exhibit "A" of Libel.)

In *The Oceana*, 244 Fed. 80, an agreement for the sale of a vessel which contained a provision that the purchaser should keep the ship clear of any liens from any cause and if any lien or libel was filed or asserted, the same to be immediately bonded by the purchaser, was held not to be authority to create liens.

Respectfully submitted,

GROSSCUP & MORROW,

W. A. JOHNSON,

Proctors for Claimant.

414 L. C. Smith Bldg., Seattle, Wash.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 18, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [4]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

Steamship “ADMIRAL GOODRICH,” Her
Tackle, Apparel and Furniture,

Respondent.

Stipulation Re Record on Appeal.

IT IS STIPULATED by the parties to the above-entitled cause, through their respective proctors, that the record on appeal in this case shall include all depositions taken in this cause, as well as all exhibits attached to said depositions, also all copies of exhibits, the originals of which were introduced in open court and, in addition, the memorandum of authorities filed in open court on January 13, 1922, by the proctors for the respondent and claimant.

WILMON TUCKER,
IVAN L. HYLAND,
FORD Q. ELVIDGE,
Proctors for Libelant.

B. S. GROSSCUP,
W. C. MORROW,
W. A. JOHNSON,
Proctors for Respondent and Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 8, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [5]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corporation,

Libellant,

vs.

Steamship "ADMIRAL GOODRICH," Her Tackle, Apparel and Furniture,

Respondent.

Order Re Contents of Record on Appeal.

Upon the stipulation of the parties hereto, through their respective proctors,

IT IS ORDERED that the record on appeal in the above-entitled cause shall include all depositions taken in this cause, as well as all exhibits attached to said depositions, also all copies of exhibits, the originals of which were introduced in open court and, in addition, the memorandum of authorities filed in open court on January 13, 1922, by the proctors for the respondent and claimant.

Done in open court this 8th day of April, 1922.

JEREMIAH NETERER,

District Judge.

Approved:

WILMON L. TUCKER,
IVAN L. HYLAND,
FORD Q. ELVIDGE,
Proctors for Libellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 8, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN ADMIRALTY—No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libellant,

vs.

Steamship “ADMIRAL GOODRICH,” Her
Tackle, Apparel and Furniture,

Respondent;

PACIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Praeceptum for Transcript of Record on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare and certify to the United States
Circuit Court of Appeals for the Ninth Circuit, sit-

ting at San Francisco, California, an additional record on appeal, setting forth the following documents and pleadings:

1. Respondent's and claimant's memorandum of authorities filed in open court January 13, 1922.

2. Stipulation that the record on appeal shall include all depositions, all exhibits attached to said depositions, all copies of exhibits, the originals of which were introduced in open court, and the memorandum of authorities filed in open court on January 13, 1922, by the respondent and claimant.

3. Order including in the record depositions, exhibits and memorandum of authorities.

4. This praecipe.

B. S. GROSSCUP,
W. C. MORROW,
W. A. JOHNSON.

Proctors for Respondent and Claimant.

Copy received April 6, 1922.

WILMON L. TUCKER,
IVAN L. HYLAND,
FORD Q. ELVIDGE,
Proctors for Libelant. [7]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 8, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

United States District Court, Western District of
Washington, Northern Division.

No. 5530.

SHELL COMPANY OF CALIFORNIA, a Corpo-
ration,

Libelant,

vs.

Steamship "ADMIRAL GOODRICH," Her
Tackle, Apparel and Furniture,
Respondent.

**Certificate of Clerk U. S. District Court to Supple-
mental Transcript of Record on Appeal.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this printed transcript of record, consisting of pages numbered from 1 to 8, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the supplemental record on appeal herein, from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges, incurred and paid in my office on behalf of the appellee for making supplemental record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [9]

Clerk's Fees (Sec. 828, R. S. U. S.)

for making record, certificate or re-

turn, 16 folios at 15¢ \$2.40

Certificate of Clerk to transcript or

record, 4 folios at 15¢60

Seal to said certificate20

I hereby certify that the above cost for preparing and certifying record, amounting to \$3.20, has been paid to me by attorneys for appellee.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 8th day of April, A. D. 1922.

[Seal]

F. M. HARSHBERGER,

Clerk United States District Court, Western District of Washington. [10]

[Endorsed]: No. 3838. United States Circuit Court of Appeals for the Ninth Circuit. Shell Company of California, a Corporation, Appellant, vs. Pacific Steamship Company, a Corporation of Portland, Maine, Claimant and Owner of the Steamship "Admiral Goodrich," Her Tackle, Apparel

and Furniture, Appellee. Supplemental Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 11, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SHELL COMPANY OF CALIFORNIA,
a Corporation, *Appellant,*
vs.

PACIFIC STEAMSHIP COMPANY, a Corpo-
ration of Portland, Maine, Claimant and Owner
of the Steamship "ADMIRAL GOODRICH,"
Her Tackle, Apparel and Furniture,
Appellee.

Brief of Counsel for Appellant

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

WILMON TUCKER,
IVAN L. HYLAND,
FORD Q. ELVIDGE,
Counsel for Appellant.

307 Lowman Bldg., Seattle, Wash.

No. 3838.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SHELL COMPANY OF CALIFORNIA,
a Corporation, *Appellant,*
vs.

PACIFIC STEAMSHIP COMPANY, a Corpo-
ration of Portland, Maine, Claimant and Owner
of the Steamship "ADMIRAL GOODRICH,"
Her Tackle, Apparel and Furniture,
Appellee.

Brief of Counsel for Appellant

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

WILMON TUCKER,
IVAN L. HYLAND,
FORD Q. ELVIDGE,
Counsel for Appellant.

307 Lowman Bldg., Seattle, Wash.

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United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SHELL COMPANY OF CALIFORNIA,
a Corporation, *Appellant,*
vs.

PACIFIC STEAMSHIP COMPANY, a Corpo-
ration of Portland, Maine, Claimant and Owner
of the Steamship "ADMIRAL GOODRICH,"
Her Tackle, Apparel and Furniture,
Appellee.

Brief of Counsel for Appellant

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

STATEMENT OF THE FACTS.

This is a suit to impress a lien in the sum of \$2267.10 against the respondent *Admiral Goodrich* for fuel oil delivered to it in San Francisco Bay by libelant on August 14, 1919.

During the year between October 10, 1918, and October 9, 1919, the Gulf Mail Steamship Company

had a fuel oil contract with the libelant for delivery of fuel oil to its steamers. On July 23, 1919, the claimant, Pacific Steamship Company, at that time the owner of the *Admiral Goodrich*, entered into a charter party with the Gulf Mail Steamship Company for said vessel (Ex. A to Libel pg. 7 Ap. on Ap.). Previous to this and during the time from the summer of 1918 until the summer of 1919, the *Admiral Goodrich* had been in the Orient under the operation of the claimant, and the Asiatic Petroleum Company of the Orient, an allied company of libelant, had been taking orders for fuel for the *Admiral Goodrich* from the claimant, the libelant billing the vessel from its San Francisco office as agent for the Asiatic Petroleum Company, and sending the bills to the San Francisco office of the claimant (Depositions Buckley, Jr., 6-12, O'Connell, 3-4).

The first occasion the San Francisco office of the libelant had to deliver oil to the *Admiral Goodrich* was in San Francisco in the morning of August 14, 1919, when the president of the Gulf Mail Steamship Company, Mr. Hartman, telephoned the assistant manager of libelant's fuel oil department at San Francisco requesting immediate delivery, and that afternoon the fuel oil in question was delivered

(Buckley's Deposition, p. 2). The bill was made out to "The Admiral Goodrich and Owners, care Gulf Mail Steamship Company, 1 Drum Street, San Francisco, California." As above mentioned, the *Admiral Goodrich* was at that time under charter to the Gulf Mail Steamship Company. Of this fact libelant was totally unaware, as well as the provisions of the charter. Libelant was also unaware of the true ownership of the vessel.

The charter was what is known as a Time Charter, government form, and provided *inter alia* as follows:

2. "That the Owners shall provide and pay for all provisions, wages, and Consular Fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance on the vessel;

* * * * *

3. "That the Charterers shall provide and pay for all bunker coals or Fuel Oil, * * *

5 B. "Charterers agree to keep vessel free from liens and redeliver her free from liens.

11. "That the captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements; * * *."

It will be seen that the charterer had no authority to bind the vessel for fuel oil.

The learned trial court was of the opinion that

the libelant should be charged with such knowledge of the ownership as would require reasonable diligence to ascertain the terms of the charter party and thus the absence of the charterer's authority, and denied the lien. Libelant appeals.

This case, therefore, presents to this Honorable Court for determination the question of when a supply man may have a lien for fuel furnished to a ship on the order of a charterer who has no authority to bind it for such.

SPECIFICATIONS OF ERROR.

Appellant, for the reversal of the decree denying the right of lien, specifies and relies upon the following errors therein: (Apostles on Appeal, 54-7).

I.A.

In holding that libelant was not entitled to the lien.

I.

Because the above-named libelant under the proof in the above entitled cause has shown that it had a right to a lien for the oil furnished under the Act of Congress of June 23rd, 1910, which is now incorporated in the Merchant Marine Act of 1920.

II.

Because the evidence shows that none of the employees or officers of the libelant had knowledge or notice that there was a charter upon the steamship *Admiral Goodrich*, and that none of the officers of the libelant corporation had any notice or knowledge of any of the provisions of such charter.

III.

Because the oil was sold by the libelant to the *Admiral Goodrich* as ordered by the manager of the steamer, and charged to the steamer and owners, and because the said steamship *Admiral Goodrich* was advertised as one of the Gulf Mail steamers in the "Guide".

IV.

Because according to the law the burden was upon the claimant to show that the libelant knew or had reasonable cause to believe that a charter existed, and the mere fact that in the year 1918 and 1919 because the libelant furnished oil to the Pacific Steamship Company for the *Admiral Goodrich* in the Orient is not sufficient notice of ownership or of the chartering said vessel to exempt the steamship from a lien for the oil so furnished.

V.

Because the evidence shows that when the first oil was furnished to the *Admiral Goodrich* in the Orient it was prior to the time that the steamship *Admiral Goodrich* was owned by the Pacific Steamship Company.

VI.

Because the evidence shows that the bill of sale to the Pacific Steamship Company of the steamship *Admiral Goodrich* was never filed in the custom house in San Francisco or in any other place than in the custom-house in Portland, Maine; nor was the charter ever filed for record in any public office whatsoever.

VII.

Because there is nothing shown in the letters and correspondence which has been entered in evidence in the above entitled cause in any manner showing the ownership of the steamer *Admiral Goodrich*.

VIII.

Because the evidence taken as a whole shows conclusively that the libelant did not have any notice of the ownership of said vessel nor of the existence of any charter and delivered the oil in good faith for the use of said vessel, and which was used upon said vessel.

IX.

Because the above-named claimant failed to sustain the burden of proof placed upon it by reason of the Act of Congress of June 23rd, 1910.

The assignments of error may all be grouped and discussed under the one head that the learned trial court erred in denying libelant's right to a lien, because there was no proof by claimant of knowledge in libelant of the ownership of the vessel, of the existence or terms of the charter party, or of circumstances showing lack of good faith in libelant in supplying the oil.

ARGUMENT.

THE LAW.

In view of the confusion among the authorities on this point we ask the indulgence of this court in permitting us to discuss the law somewhat at length and in detail.

The Time Charter, government form, was construed in *The Kate*, 164 U. S. 458.

The right to liens on vessels operating under such charters depends today upon the Act of June 23, 1910; 36 Stat. 604; Comp. Stat. 7783-7787, now incorporated in the Merchant Marine Act of 1920, with slight changes. The pertinent parts of this Act read:

“P. Any person furnishing repairs, supplies, * * * or other necessities, to any vessel * * * upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel * * * and it shall not be necessary to prove that credit was given the vessel.

“Q. The following persons shall be presumed to have authority from the owner to procure * * * supplies * * * : The managing owner, ship’s husband, master, or any person to whom the management of the vessel at the port of supply is intrusted.

“R. The officers and agents of a vessel specified in Q shall be taken to include such officers and agents when appointed by a charterer, by an order *pro hac vice*, or by an agreed purchaser in possession of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor.”
MERCHANT MARINE ACT, 1920. Section 30.

It will be noted that the fuel oil in question was furnished on the order of the charterer. This, however, is immaterial, for the charterer under the act is the “person to whom the management of the vessel at the port of supply is intrusted,” and ranks equally with the managing owner, ship’s husband and master in power to permit a lien. Prior to the act of June 23, 1910, the Supreme Court of the United States in the case of *The Kate* (*supra*), referred to a government form Time Charter as giving to the time charterer “the possession and control of the *Kate*.”

The act of June 23, 1910, made certain very marked changes in the law dealing with the right of supplymen to liens on vessels.

“It created a presumption of law of the vessel’s liability for all repairs, supplies and other necessities ordered by the master, managing owner, ship’s husband, charterer, any person to whom the management of the vessel is intrusted at the port of supply, owner, *pro hac vice*, and conditional vendee.” *The Oceana* (C. C. A. 2nd Cir. 1917), 244 Fed. 80, 156 C. C. A. 508.

By it the presumption against the credit being given the ship was swept away. So far as the presumed power of the charterer or anyone else in possession to bind the ship is concerned it became the same as the presumed power of the master. By the statute master and charterer in possession rank the same in this respect.

By section “R,” an agent appointed by a charterer has specific authority to bind the chartered ship for materials purchased (subject, of course, to the proviso therein contained), although this direct declaration of authority in the charterer would seem hardly necessary in view of the power conferred in section “Q” upon “any person to whom the management of the vessel at the port of supply is intrusted.”

Since the charterer’s agent has authority, it would require no argument to establish authority in the charterer.

Therefore, under the above act, an oil company furnishing oil to a ship upon the order of the time charterer has a maritime lien against the ship, unless the oil company "knew or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party" the charterer "was without authority to bind the vessel."

We pass, then, to the principal question in this case—the meaning and application of the above clause. This is giving the courts some difficulty. The Circuit Court of Appeals for the Third Circuit has held that

"This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States." *The Yankee*, 233 Fed. 919, 926, Decided May 18, 1916. *The South Coast*, 247 Fed. 84, 88, C. C. A. 9th Circuit, 1917. Affirmed March 1, 1920, 40 Supreme Court Reporter, page 233.

There can be no doubt as to the correctness of the above decisions when read with reference to *The Kate* (*supra*), where the following language was used:

"As the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it. His want of authority to

charge the vessel for such an expense was known or *could have been known to the libellant by the exercise of due diligence on its part.*" 164 U. S. 466.

The court further said:

"But no such necessity can be suggested, and no such reason urged, in support of an implied lien for supplies furnished to a charterer, *when the libellant at the time knew, or by such diligence as good faith required could have ascertained*, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken, as between itself and the owner, to provide and pay for all supplies required by the vessel." 164 U. S. at page 516, 517.

The proviso being merely a declaration of a legal principle, it is necessary to consider exactly what this principle was. *The Kate* (*supra*), is the leading case in point and the law as laid down in it was consistently followed by the courts until the adoption of the Act of June 23, 1910. This action involved the British S. S. "Kate" chartered to the United States and Brazil S. S. Co. under the time charter above referred to. The Berwind White Coal Mining Company supplied certain coal to the ship upon the request of the charterer. The charterers shortly thereafter became financially involved and the Coal Mining Company filed a libel against the S. S. "Kate" for the value of the coal delivered.

The libelant had had continuous dealings for many months with the charterers supplying coal to owned or chartered vessels. It knew that each vessel chartered by the Steamship Company had an agent for the business of the vessel at New York City, and as to the charters "believed or assumed and took it for granted that they contained conditions requiring the charterers, at their own expense, to provide and pay for all coal needed by the vessels." Under the conditions the court held that a lien would not lie holding that a lien cannot be enforced under the maritime law against a vessel for the value of coal supplied to it under an order of the charterer by one who knew or should be charged with knowledge that under the charter party the charterer is obliged to provide and pay for the coal, even if it was furnished both on the credit of the charterer and of the vessel.

The court based its decision upon the lack of good faith by the Coal Company in shutting its eyes to the relations of the charterers and owners of the *Kate* when it was its duty to investigate. In rendering its decision the court said:

"There are many cases in which the recognition or rejection of liens under the maritime law has depended upon the diligence of parties in ascertaining the limitations imposed by the

owners of vessels upon the authority of masters. These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel." 164 U. S. at page 466.

The court quoted at length from *Thomas vs. Osborn*, 60 U. S. 31, 32; *The Grapeshot*, 76 U. S. 129, 136, and *The Lulu*, 77 U. S. 192, 201. These three cases are to be considered as showing the development of the principle above expressed.

Thomas vs. Osborn (*supra*) was decided at a time when the views of certain members of the Supreme Court were unusually antagonistic to an extension of admiralty jurisdiction. The case involved the right of lien of a firm which lent money to a master in a foreign port to purchase necessities. The court held on the facts before the court that the libelant had no right to a lien since he knew *or by diligence should have known* that the master had no power to borrow the money in question. The court said in part:

"If the master has funds of his own, which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exist. And if the lender knows these facts, or *has the means, by the use of due*

diligence, to ascertain them, then no case of apparent necessity exists to have a credit."

Thus, under this rule established in 1856 it was incumbent on the lender of money to use due diligence in examining into the power of the master to borrow. If he did not do so, he obtained no lien.

This rule was, however, changed by the Supreme Court in *The Grapeshot*, 9 Wall. 129 (1870) in which it was held: The ordering by the master of supplies or repairs upon the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the material man, or of the ordinary lender of money, to meet the wants of the ship, who acts in good faith. Good faith of the lender or supply man became the test. In the same year the Supreme Court elaborated on this question in *Hazellhurst vs. The Lulu*, 77 U. S. 192, where the court said:

"Good faith is, undoubtedly, required of a party seeking to enforce a lien against a vessel for such a claim, but the fact that the master had funds which he ought to have applied to that object, is no evidence to establish the charge of bad faith in such a case, unless it appears that the libellant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry within the principles of law already explained. *The Sarah Starr*, 1 Sprague, 455.

Express knowledge of the fact that the master had sufficient funds for the purpose, is not necessary to maintain the charge of bad faith, as it is well settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would (§ 202) flow from the notice if it had actually been received; or in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made. *May vs. Chapman*, 16 Mees. & W. 355; *Goodman vs. Simonds*, 20 How. 343, 15 L. Ed. 934.

“Inquiry certainly need not be made as to the necessity for credit, if the master has no funds or any other means of repairing his vessel or furnishing her with supplies, and it is equally certain that proof of failure to institute inquiries is no defense to such a claim, even if the master has funds, unless that fact was known to the libellant, or such facts and circumstances were known to him as were sufficient to put him on inquiry, and fairly subject him to the charge of collusion with the master, or of bad faith in omitting to avail himself of the means of knowledge at hand to ascertain the true state of the case.

“Whenever the necessity for the repairs and supplies is once made out, it is incumbent upon the owners, if they allege that the funds could have been obtained upon their personal

credit, to establish that fact by competent proof, and that the libelant knew the same or was put upon inquiry, as before explained, unless those matters fully appear in the evidence introduced by the libelant * * * .”

These two cases remained the leading cases on the subject until the *Kate* was decided in 1896. The only case in point handed down by the United States Supreme Court was between the *Kate* and the Act of June 23, 1910, was *The Valencia*, 165 U. S. 264. In this case the libelant at several times and at the request of the charterers supplied coal to the S. S. *Valencia* then under a time charter to the New York S. S. Company. This time charter required the charterer to pay for all coal. The libelants were not aware of the existence of the charter at the time they furnished the coal, nor did they know where the ship sailed from, whether she was foreign or domestic, nor what was her credit. They were at the time without knowledge of the ownership of the vessel or of the relations between it and the New York S. S. Company, except that that company “appeared to be directing its operation.”

The court denied a lien. It based its decision upon *The Kate* and the cases above cited and said:

“The libelants knew that the Steamship

Company had an office in the city of New York. They did business with them at that office, and could easily have ascertained the ownership of the vessel and the relation of the Steamship Company to the owners. They were put upon inquiry, but they chose to shut their eyes and make no inquiry touching the matters or in reference to the solvency or credit of that company.”

The court adopts the principle laid down by Severens, District Judge, in *The Samuel Marshall*, 49 Fed. 754 (1892) that

“If the vessel is then in the use, possession, and control of others than the owner, a presumption arises that such others are liable to pay the charges incident to the employment; and if the party furnishing supplies knew, or should have known, the facts in regard to the use and control of the vessel, there is the same reason for the presumption against credit being given to the vessel, when the charterer or other person standing in a similar relation to the vessel resides at the port of supply, as in cases when the owner operating the vessel on his own account resides at such port and ‘when there is the same reason there should be the same law’.”

The same court is careful to differentiate between the powers of a master and of a charterer to bind a ship in the following words

“There were cases of supplies furnished on the order of the master, and what was said by this court must, therefore, be taken in the light

of the principle, that as the master of the ship stands in the position of agent or representative of the owners, the latter 'are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessities furnished for her use.' *The Aurora*, 14 U. S. 1 Wheat. 95, 101 (4:45, 46),"

or as expressed in *The St. Jago de Cuba*, 9 Wheat. 409, 416, the law maritime, in order that the ship may get on,

" 'attaches the power of pledging or subjecting the vessel to materialmen, to the office of shipmaster, and consider the owner as vesting with those powers by the mere fact of constituting him shipmaster'."

In conclusion the court said:

"We mean only to decide, at the time, that one furnishing supplies or making repairs on the order simply of a person or corporation acquiring the control and possession of a vessel under such a charter party cannot acquire a maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim."

Before, therefore, the Act of June 23, 1910, was passed the company furnishing fuel to a ship on request of the master secured thereby a lien on the ship for the value of the fuel provided that the supply man acted in good faith. He acted in good

faith provided he did not know of lack of power by the master to bind the ship or of facts which should have aroused his suspicion and caused him to inquire. The position of the supplier of fuel on order of a charterer was not as strong. A charterer or anyone other than a master or owner had not only no presumed authority to bind the ship but, as stated in *The Samuel Marshall* (*supra*), the law presumed that the charterer did not have power to bind the ship.

Then was passed the Act of June 23, 1910. In *The Oceana* (*supra*) it was said that "obviously the act was passed in restriction of the rights of vessel owners and in the aid of those who furnished repairs, supplies and other necessities."

By it the presumption against the credit being given the ship which was the basis of *The Samuel Marshall* (*supra*), and *The Valencia*, (*supra*) was swept away. So far as the presumed power of the charterer or anyone else in possession to bind the ship is concerned, it became the same as the presumed power of the master. By the statute master and charterer in possession ranked the same in this respect.

The act by its very terms cast a presumption in favor of the supply man. The person intrusted

with the management of the vessel (the charterer if such it be as in the case at bar) *is presumed* to have authority from the owner to purchase supplies, regardless of their relations *inter se* and regardless of the charter provisions, and the power to confer a lien. The supply man supplies under the protection of this presumption. He is entitled to rely upon it—in the absence of knowledge or notice. By the terms of the act he deals with one presumed to have authority to purchase and bind the ship. We ask this court to bear this in mind. It is the situation in which libelant is found. The libelant dealt with one presumed to have authority.

Now, what are the qualifications on the statutory presumption—the supply man *knew*, or *by the exercise of reasonable diligence could have ascertained*, that the person ordering the supplies was without authority to bind the vessel.

Since the passage of the Act there have been two lines of decisions construing this qualification: First, that which places the burden of affirmative action on the part of the supply man and holds that he has no lien if he did not use due diligence in examining into the power of the person ordering; Second, that which simply requires good faith on the part of the supply man, and only deprives him

of his lien when dealing with one carrying the statutory presumption when he had actual knowledge of the want of authority or notice of such facts or circumstances sufficient to put a reasonable person upon inquiry, which if pursued with due diligence, would apprise him of the true situation.

The principle of the first mentioned is represented by the cases of *The Eureka* (District Court N. D., Calif. Nov. 7, 1913), 209 Fed. 373, and *The Francis J. O'Hara, Jr.*, (Dist. Ct. Mass.), 229 Fed. 312. These cases follow the doctrine of *Thomas vs. Osborn* (*supra*), which was repudiated in *The Grapeshot*, (*supra*), and in *The Kate*, (*supra*). In the former case the libelant had been assured by the person ordering supplies that he had bought the vessel and on the faith of that, and also that he was actually operating it, libelant furnished supplies; but was denied a lien because libelant had been supplying the *Eureka* with supplies for claimant as its owner for years prior to that time, and because it could have ascertained by simply telephoning the office of the claimant that the person ordering the supplies had no power to bind the vessel. In the latter case the master of the *Francis J. O'Hara, Jr.*, ordered salt of libelant. He was operating upon a lay, which denied his power to

bind the vessel. Libelant knew of the lay but not of the limitation of the master's authority. Libelant knew that on some lays the master would have authority, and on some he would not. But the court denied a lien because libelant did not affirmatively inquire as to his authority. Both of these cases ignore the principle of good faith and place but little stress upon the fact that the supply man in each was entitled to presume that the person ordering the supplies had authority to bind the vessel. The decisions are based on the failure of the libelant to inquire. If they correctly interpret the act, then the test of good faith is eliminated and the right to a lien depends upon the diligence exercised in attempting to ascertain the authority. Since diligence in ascertaining authority must be exercised when dealing with one presumed to have authority as well as one not so presumed, then the statutory presumption is totally nullified, for a presumption that a supply man cannot rely on is no presumption at all. We submit, however, that the weakness in these cases lies in the fact that the opinion of the learned court did not take into consideration the rule laid down in *The Grapeshot* (*supra*), and *The Kate* (*supra*), the rule of law existing at the time of the

passing of the Act, and which rule of law is declared by the Act.

It is our contention that the second line of cases properly construes the Act, and that the case at bar comes within them.

The leading case is *The Yankee*, 233 Fed. 919 (C. C. A. 3d Cir., May, 1916). In this the dredge *Yankee* chartered to a dredging company was being used in dredging in the Delaware River. The libellants furnished supplies to the *Yankee* on orders of the dredging company. The court assumed from the evidence that the dredging company was without authority under the charter to bind the vessel for supplies and necessities. It was held that under the provisions of the Act of May 23, 1910, the supply men were entitled to liens. It was urged that the supply men should have inquired concerning the ownership of the *Yankee*. After quoting the proviso in the Act the court said:

“This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States. *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710. It is in effect that no lien shall be afforded and no presumption given in aid of a material man who

furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies of the presumptions of the law.

“What are the circumstances upon which the claimant relies to bring the libelants within the proviso of the act? They consist, first, of the libelants’ knowledge of the financial difficulties of the Dredging Company, and second, of the failure of the libelants to inquire concerning the authority of the Dredging Company to bind the *Yankee* for supplies. The circumstances of financial difficulty of the Dredging Company would not have deprived a material man of a right to a lien had the Dredging Company owned the *Yankee*. Therefore, knowledge of the Dredging Company’s embarrassment suggested nothing concerning that company’s ownership of the *Yankee* or its authority to pledge her for supplies. Nor did there devolve upon the material man the duty to inquire concerning its ownership and the authority of the Dredging Company without attendant circumstances raising the question. Such circumstances must include something more than a mere order from a new customer, and without circumstances suggesting or compelling inquiry the statute does not require a supply man to ascertain the authority of the one giving the order, if he be a person designated by the statute. If such a duty devolved upon a material man to be performed at his peril in

all instances and without regard to circumstances, then the act would impose upon the material man the duty to ascertain with absolute certainty the validity of an order as a condition precedent to a maritime lien. If this were true the presumption of authority afforded by the act would be without purpose and the very object of the act defeated."

In *The City of Milford*, 199 Fed. 956 (D. Ct. Md. October, 1912), a similar decision is rendered. Here a resident of Tennessee sold under a deferred payment contract the S. S. *City of Milford* to the Maryland Steamboat Corporation. Under this contract the purchasing company had no power to incur liens upon the vessel. The purchasing company took possession of the vessel and secured supplies from the libelants. Thereafter the purchaser defaulted in its payments and the owner took the steamer back. The material men, who had presumed that the purchaser owned the vessel and had a right to subject the ship to liens, libeled. The court upheld their liens. To the claim that the libelants should have made inquiries as to the ownership, the court said:

"The general purpose of this enactment is plain. Hereafter when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the material man knows nothing about the authority of the per-

son in possession of the ship, except that he visibly has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person intrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If under such circumstances, a material man furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say: 'I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them; but I did not know whether that which I heard was true or not. I could easily have made inquiries, and, if I had inquired, I would have found out the truth'."

The court further said:

"Before this proviso can have any application, something must have occurred to put the furnisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of a vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it,

or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as to whether the person who has the management of the ship has the right to pledge its credit." *The Iola* (D. C. 189 Fed. 979; *The Ha Ha* (D. C.) 195 Fed. 1013; *The Thomas W. Rodgers* (D. C.) 197 Fed. 772. "To the same effect see *The Oceana*, 233 Fed. 145.

In *The Oceana*, the principle was again clearly enunciated.

"Accordingly the act gives a lien when supplies are furnished to a vessel upon the order of the owner or of any one authorized by him. It specifies that any person to whom the management of the vessel at the port of supply shall have been intrusted shall be presumed to have been authorized. If the material man knows nothing about the authority of the person in possession of the ship, except that he is managing it, he may furnish the supplies, and the ship will be bound for them. But he may know more. Consequently the proviso. But before this proviso can have any application something must have occurred to put the furnisher of the supplies upon inquiry."

The court then quoted from *The City of Milford* (*supra*) and proceeded:

"The act does not mean that the furnisher shall not have the right to rely upon the authority to bind the vessel presumed to exist in the officers and agents specified in the second section. It is only when he knows that such officers or agents do not have the requisite

authority, or under the circumstances is put upon inquiry as to their powers, that the presumption becomes inoperative. There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restriction, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority. The phrase, 'knew, or by the exercise of reasonable diligence could have ascertained,' was adopted from *The Kate*, 164 U. S. 470, 17 Sup. Ct. 135, 41 L. Ed. 512, and was used in the act of Congress to make it clear that, if the furnisher know of the existence of a charter party or of an agreement for the sale of the vessel, he is put upon inquiry as to its terms, and cannot excuse himself by denying ignorance of the terms, should it turn out that the charterer or agreed purchaser had undertaken to furnish the vessel at his own cost."

To the same effect are *The South Coast*, 247 Fed. 84 (C. C. A. 9th Cir., 1917), affirmed March 1, 1920, 40 Sup. Ct. Rep. p. 233, and *The Yarmouth*, 262 Fed. 250 (C. C. A., 5th Cir. Jan. 1920), *The Angie B. Watson* (Dist. Ct. Mass., June, 1921), 274 Fed. 218.

In *The Bronx*, 246 Fed. 809, the supplies in question were furnished by libelant to the charterer, after being notified by an officer of the owner that the owner would pay for such supplies. Libelant libeled the vessel therefor, and the court (Circuit

Court of Appeals, Second Circuit) notwithstanding such information sustained the libel.

In *The Eastern*, 257 Fed. 874, coal was furnished to the charterer by libelant. Previously, libelant had furnished supplies for the vessel to its owner. The District Court (Mass.) held that such a fact did not place libelant upon inquiry as to the right of the person in charge of the ship to order supplies and bind her therefor. The libel was sustained.

In *The Lord Baltimore*, 269 Fed. 824, the vessel was in possession of the charterer under a charter party, obligating the charterer to pay all its expenses, etc. In passing upon the question of libelant's right to a lien upon the vessel, the district court (Pa.) held that a person furnishing supplies to a vessel was bound to know that the supplies were in fact for the vessel; that they in fact reached her; that they were such as were reasonably necessary; and that they were ordered by a person in apparent authority to bind the vessel (any person named in the Acts of 1910); and that the libelant having fulfilled these requirements is entitled to his lien.

In *The Dana*, 271 Fed. 356, the charter party provided that the charterer was to return the vessel

in the same condition as received, free from all claims and liens, etc. Libellant was notified to that effect, but furnished the supplies in question to the charterer. The District Court (New York) sustained the libel.

Probably the last expression of the courts on this subject is in that of the *St. Johns*, 273 Fed. 1005 (C. C. A. 4th Cir., May, 1921). There the supply man furnished coal to a vessel on order of an agent of the charterer who was intrusted with her management at the port of supply. The charterer had no authority to confer liens, and again the principle of good faith was enunciated in these terms:

“Nobody told Coale & Co., one of the supply men, that the person intrusted with the management of the *St. John* at the port of supply, was appointed by the charterer, and not by the owner, and Coale & Co. never asked any questions on the subject. The owner says that, in refraining from inquiry, Coale & Co. failed to exercise the reasonable diligence required by the proviso to the third section of the act of 1910 (Comp. St. Sec. 7785). The Circuit Court of Appeals for the Second, the Third, the Fifth, and the Ninth Circuits have held the law to be otherwise. *The Oceana*, 244 Fed. 80, 156 C. C. A. 508; *The Yankee*, 233 Fed. 926, 142 C. C. A. 593; *The Yarmouth*, 262 Fed. 254; *The South Coast*, 247 Fed. 89, 159 C. C. A. 302.

“We are of like mind. A supply man who

knows nothing about a ship, other than it is a ship in possession of those who order supplies for her, may furnish them upon her credit, without making further inquiry, taking the chance—usually a remote one—that the possession of her was tortiously acquired.”

Nor is knowledge of the fact that the vessel supplied is under charter sufficient to charge the supply men with notice of its terms, or the obligation to inquire concerning those terms, by the holding of the more recent cases, *The Yarmouth* (*supra*). *The St. John* (*supra*). In the latter case it was said:

“We are not unmindful that in a number of well-considered cases it has been said that, if the supply man has notice that the ship is under charter, he is bound to inquire whether its terms forbid the charterer to pledge the credit of the ship. But does such a holding give proper effect to the act of 1910? To say that notice of a charter puts a supply man upon inquiry is in effect to hold that there is no presumption that a charterer may charge the ship, but the statute says that precisely that presumption shall exist. *The South Coast*, 247 Fed. 89, 159 C. C. A. 302; *The Yarmouth* (C. C. A.) 262 Fed. 254,”

From the foregoing it will be seen that the decided weight of authority is this: that the lien will be permitted unless the want of authority was known or such facts or circumstances existed as to put a supply man acting in good faith on inquiry

as to the want of authority, and that in the absence of such facts or circumstances the supply man is not bound to inquire. The obligation is analogous to that of a purchaser for value of commercial paper. He is not called upon to investigate its origin or consideration given for it when there is nothing about the paper itself or the circumstances attending its negotiation to excite suspicion.

Let us apply the foregoing principles to the facts at bar.

THE EVIDENCE.

It is a fact that the libelant had no knowledge that the Gulf Mail Steamship Company was simply a charterer of the *Admiral Goodrich*. There is not a scintilla of evidence in proof of the contrary. August 14th, 1919, was the first time that the Shell Company itself had ever delivered oil to the *Admiral Goodrich* and that was the occasion of a rush order from the President of the Gulf Mail Steamship Company. (Quoting from the deposition of Mr. Buckley, Jr., pages 2 and 3.)

“A. Mr. Hartman called me up, I think it was about ten o'clock in the morning, and told me they wanted oil for the *Admiral Goodrich*, that they were in a great hurry for it, that she was, I believe, due to leave that evening. Q. What date was this? A. August 14, 1919. I had only just time to catch the tug that was over in the estuary to have a barge brought back to this city and make that delivery, which I was able to do, and we made delivery at about two o'clock in the afternoon of the same day.”

Further, it is a fact that libelant did not know that the Pacific Steamship Company was the owner of the *Admiral Goodrich*. There is no proof of the contrary. In fact, the officers and agents of the libelant had every reason to believe that the Gulf Mail Steamship Company was its owner. The

steamer was advertised in a reputable Marine daily, the "Guide," as one of the fleet of Gulf Mail steamships. (Page 70 Apostles on Appeal). The order came from one in charge of its operation. The bill was sent to the steamer "and its owners," No. 1 Drumm St., the office of the Gulf Mail Steamship Company. There was no evidence that the charter party had ever been filed in the customs office, although even that would not have been notice to the libellant. *The Dumois*, 68 Fed. 926; *The St. John*, 273 Fed. 1007.

Now appellee, in its answer to the amended libel, set out the defense of circumstances that should have placed appellant on inquiry. (Pages 27-8, Ap. on Ap.). But proof of these wholly failed. There was not a word of evidence to prove that "the name of the vessel, her home port and the house flag of claimant were plainly marked upon said vessel." As to prior dealing with the claimant for the *Admiral Goodrich*, it was said in *The Yankee*, *supra*, that "such circumstances must include something more than a mere order from a new customer." And even if that circumstance could be said to place a burden of inquiry on libellant, libellant's good faith is shown by the previous experience it had had in attempting to elicit information from

the Pacific Steamship Company concerning the ownership of its vessels. (Quoting from the deposition of Mr. Buckley, Jr., pages 3-4.)

“Q. What inquiry did you make as to ownership? A. I didn’t make any inquiry. Q. Why didn’t you make any inquiry as to her ownership? A. I never had been able to find out who the owners of these steamers were, they change around so often. Q. What steamers do you mean? A. Well, take these steamers on the Admiral Line, and the Pacific Steamship Company, the Alaska Steamship Company, the Pacific-Alaska Steamship Company, and then there was another one, another company; they were shifting their ships around so that you could not keep track of who the owners were; in fact, at one time I remember a case where I tried to find out who the owner of the steamer was, and they were very huffy about it, and thought I was trying to get control of the stock. So I gave that up as bad business; we never could get any business if we followed those tactics.”

But the delivery of oil by the Asiatic Petroleum Company to the *Admiral Goodrich* and the billing of the Pacific Steamship Company by libelant was notice of nothing to libelant. The correspondence offered in evidence by claimant shows that on October 21st, 1918, the libelant had been taking orders from the Pacific Steamship Company for subsequent deliveries of fuel to the *Admiral Goodrich*. (Exhibit No. 10 to Buckley’s deposition, page 9). At this time the *Admiral Goodrich* was not owned by the

Pacific Steamship Company. It was sold to claimant on October 24th, 1918. (Bill of Sale, Respondent-appellee's exhibit No. 18), and the bill of sale was never recorded in San Francisco, but instead at Portland, Maine, the place of claimant's head office (Endorsement on said exhibit). So that the libelant and its allied company, the Asiatic Petroleum Company, had been taking orders for fuel for the *Admiral Goodrich* from the Pacific Steamship Company prior to the time it owned the vessel and at a time when the Pacific Alaska Navigation Company was its owner. There is no proof that libelant ever knew that the ownership passed to the Pacific Steamship Company. Nothing was placed on record in San Francisco. Libelant had failed in its efforts to elicit information from the Pacific Steamship Company. It then did just what the act intended that a supply man might do—it dealt in good faith with the person in charge.

Counsel laid considerable stress on the fact that the name "Admiral" was a distinctive name of the Pacific Steamship Company. But the Pacific Steamship Company owned and operated many vessels of other names (Bond to Marshal, page 17 Ap. on Ap.) and it was only in October of 1918 that the Pacific Steamship Company came into the ownership of the *Admiral Goodrich*. Prior to that time

it was owned by the Pacific Alaska Navigation Company, and prior to that by the Arrow Line Steamship Company. (Ap. on Ap. page 36). So that the name, if anything, was a matter of confusion to libelant rather than distinction, and the confusion was the cause of libelant's efforts to learn the truth which was met with such a rebuff. The testimony gives reason for believing that there was an actual attempt on the part of the Pacific Steamship Company to cover up the true ownership of its vessels.

We submit that there is no proof of a single thing in the record to which libelant wilfully shut its eyes in order to hold this vessel. Libelant comes within the provisions of the statute. The burden of proving bad faith devolved upon appellee and we submit that it was not sustained.

We respectfully submit that the decree should be reversed and the libel impressed and judgment entered against the bond.

Respectfully submitted,

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FORD Q. ELVIDGE,

Counsel for Appellant.

**United States
Circuit Court
of Appeals**
FOR THE NINTH CIRCUIT

SHELL COMPANY OF CALIFORNIA,
a Corporation,

Appellant,

v.

PACIFIC STEAMSHIP COMPANY, a Corporation
of Portland, Maine, Claimant and Owner of the
Steamship "ADMIRAL GOODRICH," Her
Tackle, Apparel and Furniture,

Appellee.

Brief of Counsel for Appellee

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
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**United States
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FOR THE NINTH CIRCUIT

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a Corporation, *Appellant,*

v.

PACIFIC STEAMSHIP COMPANY, a Corporation
of Portland, Maine, Claimant and Owner of the
Steamship "ADMIRAL GOODRICH," Her
Tackle, Apparel and Furniture,

Appellee.

Brief of Counsel for Appellee

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

STATEMENT OF THE CASE.

This is an appeal by the Shell Company of California from a decree rendered against it in the District Court of the Western District of Washington, Northern Division, denying its right to a maritime lien upon the Steamer *Admiral Goodrich*. The basis of the alleged claim of lien was the furnishing of fuel oil

valued at \$2667.10 to the *Admiral Goodrich* on August 14, 1919, upon the order of the charterer of the vessel, the Gulf Mail Steamship Company. (Amended Libel, Ap. on App. Pg. 5).

For a full understanding of the situation leading up to the chartering of the vessel and the furnishing of the fuel oil, it will be necessary to give the following resume of the testimony:

On February 28, 1916, the Pacific Alaska Navigation Company purchased the Steamer *Airoline* from the Airoline Steamship Company. The *Airoline* was subsequently named the *Admiral Goodrich* and was owned by the Pacific Alaska Navigation Company until October 24, 1918. (Ap. on App. Pgs. 36 and 37). On October 24, 1918, the Pacific Alaska Navigation Company sold the *Admiral Goodrich* to the Pacific Steamship Company, claimant herein, and the latter has ever since owned the vessel. (Ap. on App. pages 36 and 39, also respondent's exhibit 18).

The claimant is a subsidiary of the Pacific Alaska Navigation Company, which owns the stock of the claimant. (Ap. on App. Page 37). For some ten or twelve years prior to the trial of this case the Pacific Alaska Navigation Company had used the trade name "Admiral Line" and its subsidiary, the claimant, has continued the use of that trade name. (Ap. on App. Pgs. 34 and 37).

On October 17th (Respondent's Exhibit 12), October 28th (Respondent's Exhibit 11), November 21st. (Respondent's Exhibit 10), December 6th (Respondent's exhibit 9), December 12th (Respondent's Exhibit 8), December 20th (Respondent's Exhibits 6 and 7), December 27, 1918 (Respondent's Exhibit 5), February 3rd (Respondent's Exhibit 4), March 31 st (Respondent's Exhibit 3), May 16 th (Respondent's Exhibit 2), June 20, 1919 (Respondent's Exhibit 1), the libelant, over the signature of E. R. Farley, Manager of its fuel oil department at San Francisco, wrote letters to the claimant with regard to supplying the "Admiral Goodrich" with fuel oil and in some instances, enclosed what are known as "Bought and Sold Notes" (Deposition of Cornelius F. Buckley, Pages 6, 7, 8, 9, 10 and 11).

On May 19, 1919, the libelant billed on the claimant for fuel oil furnished to the *Admiral Goodrich* (Respondent's Exhibit 13), likewise on February 23, 1919 (Respondent's Exhibit 14), March 31, 1919 (Respondent's Exhibit 15) and April 23, 1919 (Respondent's Exhibit 16).

On July 23, 1919, the *Admiral Goodrich* was chartered by the claimant to the Gulf Mail Steamship Company, which charter was executed by F. M. Barry, Assistant General Manager at San Francisco, on be-

half of the claimant, and by Paul Hartman, President, on behalf of the Gulf Mail Steamship Company. (Exhibit A to Libel) (Ap. on App. Pgs. 7 to 16, inclusive).

On August 14, 1919, the charterer, through Mr. Hartman, its President, telephoned the witness Buckley and ordered the fuel oil, which is the subject of this controversy, for the *Admiral Goodrich*. (Deposition, Buckley, Pgs. 2 and 3). The oil was thereafter furnished upon that order. Buckley says he did not know who owned the vessel and made no inquiry concerning her ownership. He states that the Gulf Mail Steamship Company was acting as Manager of the steamer. (Deposition, Buckley, Pg. 3). Parenthetically, his use of the word "manager" is a conclusion of law, not supported by the evidence. He confesses he was doubtful about the ownership of the Admiral Line vessels. (Deposition Buckley, Pgs. 3 and 4). As Assistant Manager of the libelant's fuel department, he was familiar with the standing contract to furnish oil for the specific steamers of the Gulf Mail Steamship Company and knew that the *Admiral Goodrich* was not named in that contract. (Deposition, Buckley, Page 13).

The pleadings, including the charter, testimony and exhibits, show that libelant, claimant and charterer

all maintained general or managerial offices at San Francisco.

Libelant's brief, page 7, correctly states the pertinent clauses of the charter which bear upon the questions here involved. Those questions are:

FIRST. Was the charterer one of the individuals named in the Act of Congress of June 23, 1910, who was presumed to have authority from the owner to procure supplies for the vessel?

SECOND. If the first question is answered in the affirmative, was there not sufficient information in the possession of the libelant to require the exercise of reasonable diligence in ascertaining that the charterer in ordering the fuel oil, did not have authority to bind the vessel therefor?

At the conclusion of the trial, claimant asked the court to dismiss the action upon the two grounds referred to above and submitted its memorandum of authorities which raised both issues. (Supplemental Record Pgs 2, 3 + 4). The trial court did not pass upon the first proposition, but decided the case upon the second, and, decreeing in favor of the claimant held that the libelant must be charged with such knowledge of ownership as required reasonable diligence to ascertain the terms of the charter party. (Ap. on App. 45).

ARGUMENT.

I.

A CHARTERER, AS SUCH, IS NOT ONE OF THE INDIVIDUALS NAMED IN THE ACT OF CONGRESS OF JUNE 23, 1910, WHO IS PRESUMED TO HAVE AUTHORITY FROM THE OWNER TO PROCURE SUPPLIES FOR THE VESSEL.

We are firmly of the opinion that the foregoing is the only real question involved in the determination of this case. The authorities which discuss this point are few in number, for the sole reason, we apprehend, that most maritime lien cases have revolved around orders for repairs, supplies, etc., which have been given by the master or some other individual designated by the statute as being presumed to have authority from the owner.

Had the charter been a demise instead of a time charter, this issue would not be before this court, for, in such case, the order for the fuel oil would have been given by an owner *pro hac vice*. Unfortunately for the libelant, the Gulf Mail Steamship Company was not an owner *pro hac vice* and so the libelant, having dealt with someone *other than the master*, bases its claim of lien "upon an authority to contract, which is in essence nothing more than an inference from an

apparent act of authority.” The libelant admits the charterer actually was without authority, under the terms of the charter party to impose liens on the vessel.

The Hatteras, 255 Fed. 518

In the above cited case, the court asked: “How far may one go under such circumstances, when he has no knowledge of the vessel’s ownership, agents or charterings and, closing his eyes, avoid or neglect all inquiry?” The question asked by the court in *The Hatteras* case is one which we have already propounded to the libelant and which we again repeat on this appeal.

Because the decisions are not numerous is no reason for deeming them without force and they are none the less logical. The leading case to which we shall presently advert has been cited with approval by this Honorable Court. The case upon which we confidently rely and which we believe will render unnecessary any discussion of the second proposition (the only one from Libelant’s point of view) is *Curacao Trading Company v. Bjorge*, 263 Fed., 693, writ of certiorari denied, 253 U. S. 492.

That case, bearing the stamp of approval of the United States Supreme Court, comes out flat-footed and says that there is no presumption that a charterer has authority from the owner to procure supplies, etc.

for a vessel unless he is the master, ship's husband or person to whom the management of the vessel at port of supply is entrusted; that no lien is given for supplies unless charterer stands in such relation to the vessel.

A glance at the charter party shows that the charterer had no such relation to the vessel. It is a usual time charter form wherein practically everything is furnished by the owner with the ship. It is true that the charterers are obligated to furnish and pay for fuel but, outside of dunnage and mooring lines (if required) for South American ports, fuel was the only physical supply the charterer was required to provide. However, it is plain that the owner, and not the charterer, was the person who had the management of the vessel at the port of supply. There is nothing, therefore, which can place the charterer within the terms of the statute. The libelant is standing upon the shifting sands of an authority to contract, which was nothing more than an inference from an apparent act of authority.

The Curacao Trading Company case, as stated above, has been approved by this court in *The Portland*, 273 Fed., 401. See also, *The Dana*, 271 Fed. 356, wherein Judge Chatfield of the District Court for the Eastern District of New York held that the charterer has no inherent or presumptive authority to bind the vessel's credit.

We must carefully bear in mind that this is not one of those cases where the supplies were ordered by the master, such as occurred in *The South Coast*, 251 U. S. 519, a case from this circuit.

It is clear, from the foregoing authorities, that the libelant never had a lien, not even a presumptive lien, regardless of its knowledge or lack of knowledge, its diligence or lack of diligence in connection with the charter party on this vessel.

Furthermore, the United States Supreme Court has announced that the statute is *stricti juris* and will not be extended by construction, analogy or inference.

Piedmont Coal Co. v. Seaboard Fisheries Co.
254 U. S. 1, at Pg. 12

Congress has named the persons clothed with presumptive authority to bind the vessel's credit and if, as in the case at bar, the order comes from another, the presumption does not exist nor does the lien.

II.

THERE WAS SUFFICIENT INFORMATION IN THE POSSESSION OF THE LIBELANT TO REQUIRE THE EXERCISE OF REASONABLE DILIGENCE IN ASCERTAINING THAT THE CHARTERER, IN ORDERING FUEL OIL, DID NOT HAVE AUTHORITY TO BIND THE VESSEL THEREFOR.

Assuming, but not admitting, that this case requires an interpretation, or rather, application of that part of the Act which deals with the amount of diligence to be exercised by the furnisher, we submit that the claimant has sustained the burden of proof and has met the test laid down by your Honorable Court in the case of *The Portland* already referred to. Therein it was said that the rule "to the effect that one knowing that he is dealing with a charterer is put on inquiry as to the terms of the charter party," can be accepted without disturbing the authority of *The South Coast* and citing *The Oceana*, 233 Fed. 139, *Id.* 244 Fed., 80, *The Castor*, 267 Fed. 608.

The learned District Judge has succinctly summarized the testimony on this point. (Ap. on App. Pg. 43, 44 and 45). We have also referred to the same testimony in our statement of the case. This phase, therefore, resolves itself into a very simple proposition, namely: Was the libellant, by its past dealings with the claimant, put upon inquiry when it received the order for fuel oil from the charterer? We say "simple" because the facts are not in dispute and we believe this court, as did the trial judge, will say that under such circumstances a reasonable man should have inquired. Needless to say, the opportunity of learning the facts was at hand, as all the parties were in San Francisco and the charter itself was executed in that city.

We have no particular quarrel with the libellant's historical analysis of the law of maritime liens. How-

ever, we cannot see how the libelant can derive much comfort from the decisions cited by it.

The Kate, 164 U. S. 458, is practically on all fours with the case at bar and, while that decision antedates the maritime lien statute, the United States Supreme Court has approved the doctrine that the statute made no changes in the general principles of the law as existed prior to this legislation.

Piedmont Coal Co. v. Seaboard Fisheries Co. (supra)
The Jack-o-Lantern, 42 Sup. Ct. Advance Opinions
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Furthermore, *The Yankee*, 233 Fed. 918, cited by libelant, holds the statute to be nothing more than a declaration of long recognized maritime principles. It is true that some minor changes were effected by the enactment of this statute, such as eliminating the necessity of proving that credit was given the vessel, etc. However, the theory of the law of maritime liens, its general principles, has remained the same and it is to those general principles we must look for the correct application of the law to the case now before the court.

We can find no difficulty with the numerous cases cited by the libelant in its behalf. In those decisions it has been held that the supplies were ordered by one of the persons whom the statute states was presumptively empowered to procure them, or, when such person actually was without authority, that the furnisher was not in possession of sufficient information to put him on inquiry. The statute is not hard to construe, and all of the cases really turn upon questions of fact. The latest decision on the subject can be

found in *Pensacola Shipping Co. v. United States Shipping Board Emergency Fleet Corporation*, 277 Fed., 889, wherein the court found that the furnisher had failed to exercise due diligence.

No case has or can be cited to the effect that if the furnisher had sufficient facts in his possession to put him on notice, he could, nevertheless shut his eyes and, dealing blindly with one who was forbidden to impose liens upon the vessel, enforce an alleged claim of lien.

Libelant's statement that the Pacific Steamship Company attempted to conceal the true ownership of its vessels is pure innuendo. The claimant's record is open to inspection, so that he who runs may read. The whole trouble with the libelant in this case is that it ran too quickly and neglected to read the signs which were there to be seen, had it elected to open its eyes. Libelant's remark has no bearing whatsoever upon the issues herein.

In conclusion, we believe that the libel was properly dismissed upon the grounds set forth in the trial court's decision and we submit that, in any event, it should have been dismissed for the additional reason that the order for the fuel oil was given by a person who was without authority, either presumptive or actual, under the terms of the Act, to procure supplies for the vessel.

We, therefore, ask that the decree of the District Court be affirmed.

Respectfully submitted,

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No. 3838

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHELL COMPANY OF CALIFORNIA
(a corporation),

Appellant,

VS.

PACIFIC STEAMSHIP COMPANY (a corporation of Portland, Maine), claimant and owner of the steamship "Admiral Goodrich", her tackle, apparel and furniture,
Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

MAY 10 1922

F. D. MONCKTON,
CLERK

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Appellee.

APPELLANT'S REPLY BRIEF.

I.

THE PRESUMED AUTHORITY OF GOVERNMENT FORM TIME
CHARTERERS TO PROCURE SUPPLIES ON THE CREDIT OF
THE STEAMER CHARTERED.

Government form time charterers are presumed to have authority to procure supplies on the credit of the steamer chartered.

As opposed to this statement, the brief of the appellee states:

"A charterer, as such, is not one of the individuals named in the Act of Congress of

June 23, 1919, who is presumed to have authority from the owner to procure supplies for the vessel.

“We are firmly of the opinion that the foregoing is the only real question involved in the determination of this case.” (Brief, 10.)

In so stating the appellee fails to distinguish between the several different forms of charters in use.

Charters are, roughly, divisible into voyage forms, time forms and demise forms. Demise charters of ocean going steamers, or even sailing ships, are, as is well known, extremely rare. The few authorities dealing with demise charters of off-shore, or even coastwise, vessels show how very unusual they are. Demise charters are practically confined to the chartering of lighters, tugboats, ferryboats and small craft generally. On the other hand, when ships sail under voyage charters, fixing a rate for full cargoes of lumber or grain or coal or whatever the full cargo may be, the voyage charterer is practically the holder of the contract of affreightment, agreeing to furnish a full cargo on the ship chartered. Such a charterer has no control over the movements of the ship or her operation, and in fact, if a cesser clause is included in the charter, the charterer is free from any liability to the shipowner the moment that the cargo is fully loaded and the bills of lading signed.

Time charters are, however, entirely different from voyage charters. The time charterer is not a mere furnisher of cargo paying freight or dead freight depending upon whether the agreed cargo

is furnished or not furnished. The time charterer takes delivery of the vessel chartered, and, within certain trading limits usually set in the charter party, can use her for any lawful purpose he sees fit.*

All this is exceedingly elementary, but it seems to have escaped the notice of the appellee.

The charter of the "Admiral Goodrich" from the Pacific Steamship Company was the usual "Government form time charter" (Record, 7). This form, with a few minor variations, has been the basis of steamship time charters for the last forty years. It provides for the payment by the owners of wages, provisions, stores and insurance, and for payment by the charterers for fuel oil, port charges, dock charges, pilotage, stevedoring, etc. The charter provided for a term of three calendar months, for the ship to be "delivered" in San Francisco, and for a charter hire of \$21,508 per calendar month,

"commencing on the day of delivery as aforesaid; hire to continue from the time specified for terminating the Charter until her redelivery to Owners (unless lost) at San Francisco or Puget Sound, Charterers' option. * * *".

* "In the case of the trip charter party, the owner retains possession of, and operates, his vessel, and his payment is based upon the amount of cargo transported, at so much per ton, or per 100 pounds, quarter, bushel or other cargo unit. The time charter party, on the contrary, places the vessel in the possession of the charterer. It may, however, provide that the owner shall man and provision the vessel. In ocean traffic the usual practice is for the charterer to pay to the owner an agreed rate per dead-weight ton, and also to furnish the fuel and pay all expenses incurred at the ports, except crew and provision expenses."

(*Johnson: Principles of Ocean Transportation*, 1918, pp. 171, 174.)

Two other paragraphs of interest are:

“5B. Charterers agree to keep vessel free from liens and redeliver her free from liens.”

“11. That the Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements * * * and the Charterers hereby agree to indemnify the Owners from any consequences and liabilities that may arise from the Captain signing such Bills of Lading, or in his otherwise following the Charterer’s instructions”.

The charter of the “Admiral Goodrich” was, therefore, as stated, a simple government form, with the only variation that contained in “5B” above quoted.* (Record, 7.)

The appellee, after urging that under section two of the Lien on Vessels Act of June 23, 1910, there is no presumption that a charterer has authority from the owner to procure supplies unless he is “the managing owner, ship’s husband, master, or any person to whom the management of the ship is entrusted at the port of supply”, argues that the “Admiral Goodrich” was not managed at San Francisco by the Gulf Mail Steamship Company.* This argument of the appellee is unsound for the following reasons:

* See, for discussion of Government form charters, chapter on subject in Ocean Shipping (pp. 310-319), The Century Company, 1920. For early form see “Time Charter—Government Form” in Reed’s Shipowners’ and Shipmasters’ Handy Book (Sunderland, England), pp. 252-254.

* The appellee lays much emphasis on the case of *Curacao Trading Co. v. Bjorge*, 263 Fed. 693. In that case “The libellant’s representative testified that the coal was furnished on the order and credit of the charterers”.

(1) The undisputed testimony of Mr. Buckley was that the "Admiral Goodrich" was managed in San Francisco by the Gulf Mail Steamship Company (Dep. Buckley, 3).

(2) Entirely independent of this evidence, however, anyone familiar with the way in which shipping is done today realizes that when a ship comes to a port she is practically always looked after by an agent.*

(3) The charter party shows that the "Admiral Goodrich" was in the *possession* of the Gulf Mail Steamship Company, to be redelivered to the Pacific Steamship Company upon the expiration of the term of three months.

(4) The Supreme Court of the United States, in *The Kate*, 164 U. S. 456, at 460, a case construing a government form time charter, has held that the "charterer" had "possession and control" of the ship.

(5) Under the Act of June 23, 1910, Government form time charterers have presumed authority to

* "The duties of consignees or agents of ships, or the agents of charterers or owners, are so similar and undistinguishable that without some positive knowledge of their relations, contracts, and agreements, it is impossible to determine to which class an agency may belong; and the fact that a merchant purchases supplies, or procures services to be rendered a vessel, raises no presumption that he therefor sustains relations with the owners that make him responsible, and relieve the vessel from a lien. In the great majority of instances, in ordinary practice, the material man or stevedore contracts with, and takes his bill for payment to, the agent of the ship, whether he represents the owners or charterers, without the intervention of the master; but by so doing, he does not abandon his right to look to the vessel in event of a nonpayment. It cannot be presumed or expected that he can be informed as to the exact provisions of the charter, or the responsibilities of the parties, in each particular case."

Norwegian Steamship Co. v. Washington [The Kong Frode], [1893], 57 Fed. 224, at 225.

bind the ship. This is clear from an examination of section three of the Act, which reads in part as follows:

“The *officers* and *agents* of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by * * *”. (Italics ours.)

The only *officer* mentioned in section two is the master. No *agents* are mentioned in section two except such as may be included in the term “person to whom the management of the vessel at the port of supply is intrusted”. The statute thus includes agents at the port of supply as having presumed authority to bind the ship. A demise charterer is “an owner *pro hac vice*”, so that the use of the word “charterer” in section three in addition to the use of the words, “an owner *pro hac vice*”, very clearly shows that the word “charterer” includes an ordinary charterer, i. e., a time charterer. Charterers’ agents are, therefore, specifically included in those with presumptive authority to order. It seems impossible to escape from these conclusions, which, moreover, have been clearly recognized by the courts.

As was stated by the Circuit Court of Appeals in *The St. Johns*, 273 Fed. 1005, at 1007:

“To say that notice of a charter puts a supply man upon inquiry is in effect to hold that there is no presumption that a charterer may charge the ship, but the statute says that precisely that presumption shall exist.”

II.

THE ALLEGED LACK OF GOOD FAITH BY THE SHELL COMPANY
OF CALIFORNIA.

The development of the law, resulting in the test of *good faith* as determining whether the supply man has a lien, has been brought out in the opening brief.

The adoption of the rule in this circuit is made clear by the following language used in *The South Coast*, 247 Fed. 88:

“It is the purpose of the statute, as it was the purpose of the law previous thereto, that the furnisher of such commodities as are necessary to enable a ship to enter upon or pursue her voyage, and to engage in the maritime traffic, to which only she is adapted, shall have a lien on the ship therefor. It is in the interest of shipping, conducted upon maritime waters, that such should be the case, as otherwise credit would not be extended, upon the account of the owner or master alone, to enable the ship to discharge its peculiar function, and great inconvenience would follow, to the detriment and disadvantage, if not the ultimate disaster in large measure, of maritime shipping. Many ships sail under charter, either verbal or in form of regularly drawn charter parties, and it is usual and customary for the charterer in either event to disburse the necessary expenses of the ship; and of this all persons furnishing supplies, etc., to a chartered ship must be deemed to have notice. But notwithstanding this notice, or even knowledge that the ship is under charter, *we cannot believe that it was the intendment of the statute or of the law that the furnisher should, because of that fact, be deprived of his lien when advancing necessary repairs or supplies in good faith to enable the*

ship to engage in her accustomed traffic.”
(Italics ours.)

The Court in the above case then went on to say that in *The Kate*, supra, the decision hinged on the fact that there was an element of fraud in the transaction of claiming a lien, to which the libellant was a party.

The burden of showing the bad faith of the supply man is admittedly on the ship.

The Yankee (1916), (C. C. A. 4th); 233 Fed. 919, 926;

The Oceana (1917), 244 Fed. 80, 83.

The Pacific Steamship Company, in order to defeat the right of the Shell Company of California to a lien against the “Admiral Goodrich” for the fuel oil promptly delivered to that vessel, must therefore show that the Shell Company acted in bad faith and conspired with the Gulf Mail Steamship Company to perpetrate a fraud on the steamer. A charge that an oil company like the Shell Company of California, in a year of extreme commercial prosperity, and when a shortage of fuel was universally recognized, would stoop to sell some twenty-five hundred dollars’ worth of oil in bad faith to a steamer, is, on its face, without merit.

The opinion of the lower Court does not discuss the principles underlying the right to a lien. The Court states that on cross-examination it was shown that the Pacific Steamship Company purchased fuel oil for the “Admiral Goodrich” nine times

within the ten months previous to June 21, 1919 (Record, 44). With due deference to the Court below, an examination of the letters referred to does not warrant such a statement. The brief of the appellee claims only four such sales (Brief, 7). The sales in question were made in the Orient through the Rising Sun Petroleum Company (Resp. Exhibits 1, 12, Dep. Buckley). They were made along with other sales of oil delivered to the "Admiral Wainwright", the "Libby Main" and the "W. F. Burrows" (Resp. Exhibits 1, 5, 6, 7, 8, 10, 11, Dep. Buckley). The "Libby Main" and the "W. F. Burrows" were *not* owned by the Pacific Steamship Company (Dep. O'Connell, 7, 8). The "Admiral Wainwright" was sold to the Dollar Company, and was for some time operated by that company under the name "Admiral Wainwright" (Dep. O'Connell, 8). The only "bought and sold note" introduced was with the Pacific Steamship Company, dated October 17, 1918, providing for the sale of oil to the "Admiral Goodrich". On this date the Pacific Steamship Company did not own the "Admiral Goodrich" (Woolsey, Record, 36). In other words, a study of these letters will show that the Pacific Steamship Company was acting as agent for itself or for owners or charterers of sundry ships in the Orient, and buying oil for them. There is nothing to indicate that the Pacific Steamship Company was recognized as an owner of the "Admiral Goodrich", any more than it was of the "Libby Main" or "W. F. Burrows"—and the two

latter vessels admittedly were not owned by the Pacific Steamship Company (Dep. O'Connell, 7, 8).

The only other ground upon which it was held that the Shell Company was constructively on notice of the terms of the charter party was a statement of C. F. Buckley that he could not keep track of the owners of the Admiral Line—Pacific Steamship Company—Pacific Alaska—Alaska Steamship Company steamers. In this he evidently was not alone. Lawrence O'Connell, the assistant general agent of the Pacific Steamship Company at San Francisco in 1919, while quite positive on direct examination that the Pacific Steamship Company owned the "Admiral Goodrich", later admitted that he did not know which Alexander Company owned her. He testified: "I don't know the inner workings; I am frank to say that" (Dep. O'Connell, 6).

When the charter party itself was drawn it was signed: "Pacific Steamship Company, agents for Owners", showing that apparently the very men who made out the charter party were not clear as to which company actually had title to the steamer.

Except as an academic question, however, the determining of just what corporation owned the "Admiral Goodrich" or owns any ship supplied, does not seem of particular importance. Ships are constantly changing ownership. No shipping man attempts to follow such changes. Practically all important operating companies are made up of groups of companies, with the parent company controlling

the subsidiaries by stock ownership. Vessels are switched around from one company to another with various charters, or operating or other agreements generally known to very few officials. The United Fruit Company used to carry title to each vessel of its large fleet in a separate corporation. Combinations like the P. & O., the Furness and the Ellerman lines have ten or more corporations apparently tied together by various agreements. All informed shipping men know this, but they are no more interested than is the passenger who travels on the lines. When a steamer of one of the above lines comes, for instance, to San Francisco, some recognized agent handles the ship. If an Ellerman ship, it is Norton, Lilly & Company, if a Furness ship, Swayne & Hoyt, Inc., if a Union Steamship (P. & O.) ship, Hind, Rolph & Co., Inc. The business is all done through agents, who may represent the owners or time charterers. The tugboat company and the stevedoring company and the fuel company and the furnishers of provisions do not know who owns the ship, and the very agents themselves are not apt to know just where the legal title to each ship lies. The services or goods are supplied to the ship on the orders of those handling her at this port; and when supplied, bills are sent to the ship and owners in care of the agents giving the order. Surely these supply men are not deprived of their lien rights because on each order from a responsible house they do not make an investigation of the companies owning and operating the ships.

So here in this case it is impossible to understand where bad faith can be presumed in the prompt filling of an order for fuel given by a shipping company of good repute, a time charterer advertising the "Admiral Goodrich" as one of its own line.*

III.

THE EFFECT OF A DECISION HOLDING THE SHELL COMPANY HAS NO LIEN ON THE "ADMIRAL GOODRICH".

Prior to the passage of the Act of June 23, 1910, it was established that the supply man furnishing supplies in a foreign port on the order of a charterer was entitled to a lien.

In *The George Dumois*, 68 Fed. 926, 929 (C. C. A. 5th, 1895), the Court sustained the lien of a Mobile coal company supplying fuel at Mobile to a steamer upon the order of the president of the

* It seems to be taken for granted that the charter forbade the charterer to purchase necessities on the credit of the ship. But as was said by this Court in *The South Coast*, supra, to defeat the lien of a supply man who knows the terms of the charter there must be a clause that "unalterably inhibits the master of the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon". The clause, "*Charterers agree to keep vessel free from liens and redeliver her free from liens*," does not, in our opinion, comply with this test. The charterer could not employ stevedores, or carry cargo or operate the ship at all without the incurring of inchoate liens. Whether they are enforced or not, is a different matter. Obviously, when a libel is filed against the ship the charterer is obligated under this provision to bond the ship; but this does not mean that the charterer has broken the charter as soon as he hires a tugboat, or puts a stevedore on board or loads a ton of cargo. For discussion see *The Surprise*, 129 Fed. 873, at 878, where the Court said:

"The charterer is bound to disburse the vessel and protect her from liens, and impliedly agrees to do so, an agreement as effectual in law as an express one."

Under the law, insofar as it has been decided, a fuel company which had the "Admiral Goodrich" charter construed by its own lawyer would probably be advised that the Gulf Mail Steamship Company had the right to purchase fuel on the credit of the ship.

charterer of the steamer. The coal company knew that the steamer was chartered but did not know that in the charter the charterer agreed to pay for the fuel.

The Court said:

“From the principles declared in *The Kong Frode* and in *The Patapsco* and cases there cited by Mr. Justice Davis, we understand the rule to be that, where necessary supplies are furnished to a ship in a foreign port, and they are received by the master, and used by him in the service of the ship a maritime lien results, unless it shall appear that the furnisher of supplies did not rely upon the ship, but trusted solely to the personal credit of the owner; and the burden of proof in such a case to defeat the lien lies upon the ship and her claimants. Applying this rule to the case in hand, we are compelled to differ with the learned judge of the court below as to the proper decision of this case. Taking the facts to be as we find them in the record, we cannot infer from them that the libellant in the court below (appellant here) furnished the coal on the personal credit of the charterers, and did not rely upon the credit of the ship.”

The Philadelphia, 75 Fed. 684 (C. C. A. 1st, 1896), cited by this Court with approval in *The South Coast*, supra, is a similar case. Coal was furnished to steamers under charter upon the orders of the agent of the chartering line. The objection was made that the master was not shown to have given the order for the fuel.

The Court said (at p. 686):

“It would be intolerable, and entirely contrary to the practice of the courts, to hold that

persons furnishing vessels such supplies in small quantities, to meet the requirements of the law for effectuating a lien, must prove express orders by the master. It is *prima facie* sufficient in such cases that the supplies are of the character which we have described, and come aboard under such circumstances that the master can properly be assumed to acquiesce in their purchase and reception."

In *The Kong Frode*, *supra*, it was held that the mere fact of a vessel's being under charter by a charter party which makes the charterers liable for expenses of loading and unloading is not sufficient to exempt the vessel from liability to one who renders stevedore services at the request of charterers' agents; and it was further held that the burden was on the vessel to show that the stevedore had knowledge of the terms of the charter party.

It is now, in effect, urged by the appellee, that the Courts should turn about and hold that the Act of June 23, 1910, nullifies the above cases, and prevents a fuel company from obtaining a lien for fuel supplied to a ship under time charter in a foreign port. This is argued in spite of the fact that the Act has constantly been recognized as designed to protect and *enlarge* the rights of supply men.

It is further urged by the appellee that the Shell Company of California, which had previously billed the appellee for supplies furnished the "Admiral Goodrich", on receiving two months later, another order from the same ship from a different company managing the ship and advertising the vessel as one

of its own fleet, is required to investigate the ownership and the charter of the vessel or else be held to have acted in bad faith. If the Act of June 23, 1910, is so construed, it needs no argument to show that Congress by that Act dealt a stunning blow, not only to the rights of supply men, but also to the consequent credit of ships, and increased the confusion in the maritime law existing prior to that date.

Dated, San Francisco,

May 15, 1922.

Respectfully submitted,

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